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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

APPOLO FUELS, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

JAMES R. GOLDEN
P.O. Box 1400
1914 Cumberland Avenue
Middlesboro, Kentucky
(606) 248-2766

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether landowners who purchased land after the passage of SMCRA may have any reasonable investment-backed expectations in mining coal on their property.

2. Whether the Federal Circuit and the Court of Federal Claims erred in their takings analysis by adopting a "relevant parcel" neither proposed nor advocated by either party, and on which no evidence was presented or taken.

3. Whether legislative findings considering only hypothetical facts conclusively determine the "character of the governmental action" as to a specific party for takings purposes.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Appolo Fuels, Inc. ("Appolo") was plaintiff and appellant below. Respondent United States was defendant and appellee below.

Pursuant to S. Ct. Rule 29.6, Appolo states that it has no parent corporation, and no publicly traded company has a 10% or greater ownership interest in Appolo.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
I. THIS COURT SHOULD CLARIFY THE CIRCUMSTANCES IN WHICH A LOWER COURT CAN ADOPT A PER SE RULE NEGATING REASONABLE INVESTMENT-BACKED EXPECTATIONS.	7
II. THE COURT OF APPEALS MADE IMPROPER SUA SPONTE DETERMINATIONS IN REFORMULATING THE "RELEVANT PARCEL."	9
III THE FEDERAL CIRCUIT IMPROPERLY TREATED GENERAL LEGISLATIVE FINDINGS AS CONCLUSIVELY INSULATING THE REGULATION FROM TAKINGS CHALLENGE.	13

TABLE OF CONTENTS—Continued

Page

CONCLUSION 19

APPENDICES

Appendix A: Judgment of the United States Court of Appeals for the Federal Circuit, dated August 30, 2004 ..... 1a

Appendix B: Order of the United States Court of Federal Claims, dated December 18, 2002 ..... 22a

Appendix C: Judgment of the United States Court of Federal Claims, dated December 18, 2002 ..... 70a

Appendix D: Order of the United States Court of Appeals Denying Petition for Panel Rehearing or Rehearing en banc, dated October 7, 2004 ..... 71a

Appendix E: The Surface Mining Control and Reclamation Act of 1977, Section 1272(c) of Title 30 ..... 72a

TABLE OF AUTHORITIES

Page

CASES:

Agins v. City of Tiburon, 447 U.S. 255 (1980) 13

Brock v. *Carroll*, 107 F.3d 241 (4th Cir.), *cert. denied*, 522 U.S. 924 (1997) 11

Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986) 10

Chancellor Manor v. *United States*, 331 F.3d 891 (Fed. Cir. 2003) 3

Cienega Gardens v. *United States*, 331 F.3d 1319 (Fed. Cir. 2003) 3

City of Monterey v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) 14

Commonwealth Edison Co. v. *United States*, 271 F.3d 1327 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002) 7

Concrete Pipe & Prods. of Cal., Inc. v. *Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602 (1993) 12

Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358 (Fed. Cir. 1998) .....*passim*

Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 14

TABLE OF AUTHORITIES—Continued

Page

Florida Rock Indus., Inc. v. *United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) 13, 16

John Deere Co. v. *Americana Nat'l Bank, Stafford*, 809 F.2d 1190 (5th Cir. 1987) 11

Keystone Bituminous Coal Ass'n v. *DeBenedictus*, 480 U.S. 470 (1987) 12

Langevin v. *Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971) 16

Londoner v. *City & County of Denver*, 210 U.S. 373 (1908) 16

Loveladies Harbor, Inc. v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994) 13

Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 14, 19

M&J Coal v. *United States*, 47 F.3d 1148 (Fed. Cir.), *cert. denied*, 516 U.S. 808 (1995) 16, 18

Machipongo Land & Coal Co., Inc. v. *Commonwealth*, 799 A.2d 751 (Pa.), *cert. denied*, 537 U.S. 1002 (2002) 8, 18

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 17

Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987) 14

Palazzolo v. *Rhode Island*, 533 U.S. 606 (2001) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Palm Beach Isles Assocs. v. *United States*, 231 F.3d 1354 (Fed. Cir. 2000) 3

Penn Cent. Transp. Co. v. *City of New York*, 438 U.S. 104 (1978) 12

Prager v. *Hodel*, 793 F.2d 730 (5th Cir.), *cert. denied*, 479 U.S. 988 (1986) 15

Rith Energy v. *United States*, 247 F.3d 1355 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002) 16, 18

Rith Energy v. *United States*, 270 F.3d 1347 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002) ("*Rith II*") ..... *passim*

State ex rel. RTG, Inc. v. *State*, 780 N.E.2d 998 (Ohio 2002) 9, 18

Tahoe-Sierra Pres. Council, Inc. v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) 7, 12

Vivid Tech., Inc. v. *American Science & Eng'g, Inc.*, 200 F.3d 795 (Fed. Cir. 1999) 10

Walcek v. *United States*, 303 F.3d 1349 (Fed. Cir. 2002) 9

Weiss v. *Reebok Int'l Ltd.*, 2004 WL 434158, 91 Fed. Appx. 683 (Fed. Cir. Mar. 9, 2004) 11

TABLE OF AUTHORITIES—Continued

Page

Whitney Benefits, Inc. v. *United States*, 18 Cl. Ct. 394 (1989), *aff'd*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991) 13

Wilder v. *Prokop*, 846 F.2d 613 (10th Cir. 1988) 12

CONSTITUTION:

U.S. Const. Amend. V ..... *passim*

STATUTES:

28 U.S.C. § 1254(1) 2

30 U.S.C. § 1272 ..... *passim*

REGULATIONS:

48 Fed. Reg. 41,312 (Sept. 14, 1983) 15

OTHER AUTHORITIES:

Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663 (1996) 12

John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994) 12

10A Charles A. Wright, Arthur R. Miller & M.K. Kane, Federal Practice and Procedure: Civil § 2719 (3d ed. 1988) 11

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Appolo Fuels, Inc. ("Appolo") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Federal Circuit affirming the judgment of the Court of Federal Claims is reported at 381 F.3d 1338 and is reprinted at App. 1a. The opinion of the Court of

Federal Claims is reported at 54 Fed. Cl. 717 and is reprinted at App. 22a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 2004. App. 70a. A timely petition for rehearing and rehearing en banc was denied on October 7, 2004. App. 71a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statute, 30 U.S.C. § 1272, is set forth in the appendix to this brief. App. 72a.

INTRODUCTION

The holding of the Federal Circuit in this case is remarkable. The court announced that anyone, anywhere in the country who purchases land intending to mine coal cannot have a reasonable investment-backed expectation that it will actually be able to mine the land. According to the Federal Circuit, parties cannot buy land which includes coal reserves and think they will be able to mine that coal solely because mining is regulated. But the existence of a rarely invoked provision allowing the government to designate certain lands as "unsuitable for mining" plainly does not permit the government to deprive a landowner of all of the economic value of its land. The Court made this point clear in *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001).

Ignoring this Court's explicit warning in *Palazzolo*, the Federal Circuit in this case adopted a per se rule for determining a property owner's reasonable investment-backed expectations. The reasoning of the Federal Circuit's precedential opinion prohibits any landowner who acquired his property after 1977 from asserting a takings claim should his land ever be declared "unsuitable for mining." This categori-

cal prohibition is directly contrary to this Court's opinion in *Palazzolo* and is inconsistent with other decisions on the point.[1] Such open conflict with this Court's instruction fully merits the grant of a writ of certiorari.

This case also highlights the continuing disarray in the lower courts over the "difficult, persisting question" of how to determine the proper "parcel as a whole" in a Fifth Amendment takings analysis. *Palazzolo*, 533 U.S. at 631. No fewer than four relevant parcels are in play here: Appolo, the government, the Court of Federal Claims, and the Federal Circuit *each* advocated a *different* "parcel as a whole."

The Government moved for summary judgment on an extreme theory—that every lump of coal possessed by Appolo on the operative date of the taking constituted the "relevant parcel." Appolo thoroughly refuted this untenable theory, thus satisfying its burden to demonstrate that the Government had not shown entitlement to judgment as a matter of law. But without notice to Appolo, the Court of Federal Claims and the Federal Circuit each made independent findings as to the "relevant parcel"—not permitting Appolo to offer the evidence it could have presented on those newly conceived parcels. The Federal Circuit thus required Appolo to not only defeat the Government's version of the

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[1] *See, e.g.*, *Cienega Gardens* v. *United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003) (noting possibility of regulation does not mean "regulated businesses can have *no* reasonable investment-backed expectations whatsoever"); *Chancellor Manor* v. *United States*, 331 F.3d 891, 904 (Fed. Cir. 2003) (noting that arguments that field was highly regulated and that change in regulation could have been anticipated were not sufficient individually or together to support summary judgment); *Palm Beach Isles Assocs.* v. *United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) (the existence of a regulatory regime does not per se preclude all investment-backed expectations).

facts, but to both anticipate and preemptively defeat any other potential formulations of the "relevant parcel."

It is, of course, improper for a court to decide a disputed issue of material fact against the nonmovant at the summary judgment stage. It contravenes basic and longstanding principles of law for the court to decide a disputed issue of fact *sua sponte* in a manner advocated by neither party and without providing the nonmovant any opportunity to respond.

Finally, the trial and appellate courts both treated legislative findings of the Office of Surface Mining ("OSM") as if they were findings in a proceeding that had allowed Appolo to litigate its rights. In so doing, the trial court determined that the findings conclusively established the government's nuisance defense to Appolo's takings claim. Yet OSM considered in the "lands unsuitable for mining" ("LUM") procedure only the *possible* effects of a *hypothetical* mine. This is a far cry from a finding that Appolo's *actual* mining plan *more probably than not* would have created the same effects. The LUM decision cannot collaterally estop Appolo from showing that its specific mining plan would have alleviated the general concerns expressed by OSM.

STATEMENT OF THE CASE

Appolo began surface mining coal in 1972 as a father-and-son operation, and since then has been operating both surface and underground mines in Kentucky and Tennessee. In 1989, Appolo acquired the first of several leases conveying coal mining rights within the watershed of Little Yellow Creek, a valley that also contains the Fern Lake Reservoir (the "watershed" or the "Petition area"). The reservoir serves as the water supply to the nearby town of Middlesboro, Kentucky.

The land within the Fern Lake Watershed had been mined for decades, and mining had lawfully continued after the passage of the Surface Mining Control and Reclamation Act ("SMCRA") in 1977. When Appolo acquired its first watershed lease (the "5A" lease) in 1989, three post-SMCRA mining permits existed for areas within the watershed.

Shortly after Appolo applied for a new permit to mine within the watershed, the City of Middlesboro and the National Parks Conservation Association filed a Petition pursuant to 30 U.S.C. § 1272 requesting that OSM declare the Fern Lake Watershed to be "lands unsuitable for mining" (the "Petition" or the "LUM" petition). Two and a half years later, on September 13, 1996, the Director of OSM banned all surface mining within the watershed.

Having lost ten million tons of recoverable coal reserves by virtue of the Director's declaration, Appolo sought compensation for the government taking in the Court of Federal Claims. The Government moved for summary judgment on Appolo's claim, asserting, among other things, that the proper "parcel as a whole" to be used in analyzing the takings claim was *all* coal reserves held by Appolo on September 13, 1996. Appolo objected to the Government's construction of the "parcel as a whole," asserting that the "logical mining unit" of coal reserves *within the Petition area* was the appropriate "parcel as a whole."

The Court of Federal Claims granted the government's motion for summary judgment, concluding that:

(1) The "relevant parcel" was *neither* that advanced by the Government *nor* by Appolo, but consisted of certain of Appolo's leases, only portions of which fell within the Petition area, App. 46a; and

(2) Because SMCRA—and its provision permitting LUM petitions—existed at the time Appolo acquired the property,

Appolo could not have possessed any reasonable investment-backed expectations that the Fern Lake Watershed would be suitable for mining. App. 54a.

The Court of Federal Claims also treated OSM's findings in the LUM decision—which posited only a hypothetical mine in a legislative rulemaking proceeding—as binding facts.[2] Based solely upon those findings, the Court of Federal Claims found that OSM's decision was tantamount to abatement of a nuisance, and that Appolo accordingly was not entitled to compensation.

The Federal Circuit upheld the judgment, in part by analyzing an entirely new relevant parcel—just two of Appolo's leases. As with the Court of Federal Claims's adoption of its own "relevant parcel," no such parcel had been proposed by either party. The Federal Circuit also affirmed the finding of the Court of Federal Claims that the existence of SMCRA was sufficient to bar Appolo's takings claim. The Federal Circuit did not address the Court of Federal Claims's conclusion on the issue of nuisance, instead finding that OSM had determined in the LUM proceeding that mining within the watershed would endanger the community. The court of appeals held that any "taking" resulting from the petition thus required no compensation under *Rith Energy* v. *United States*, 270 F.3d 1347 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002) ("*Rith II*"). App. 18a-19a.

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[2] For example, the OSM decided that a *hypothetical* mine would increase sediment in the water due to uncontrolled drainage along haul roads. But Appolo's actual mining plan specifically provided for drainage control along haul roads. *See* Fed. Cir. Reply Br. 16-17.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CLARIFY THE CIRCUMSTANCES IN WHICH A LOWER COURT CAN ADOPT A PER SE RULE NEGATING REASONABLE INVESTMENT-BACKED EXPECTATIONS.

In *Palazzolo* v. *Rhode Island*, this Court considered and rejected the proposition that when a property owner acquires that property with notice of a pre-existing restriction, no taking can occur: a "regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title." 533 U.S. at 629-630 (2001). As the Court there explained, a rule precluding any property owner from asserting a takings claim based on a preexisting regulatory regime would improperly "put an expiration date on the Takings Clause"; "[f]uture generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Palazzolo*, 533 U.S. at 627; *see also Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002) (noting that the Court "still resist[s] the temptation to adopt *per se* rules in our cases involving partial regulatory takings.").

The Federal Circuit in this case adopted just the sort of *per se* rule this Court warned against in *Palazzolo*: no property owner who acquired land after the enactment date of SMCRA possesses any reasonable expectation that he will be allowed to mine that land. The Federal Circuit's plain departure from Supreme Court takings analysis warrants certiorari treatment.

The Federal Circuit purported to apply the test articulated in *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327 (Fed. Cir. 2001), *cert denied*, 535 U.S. 1096 (2002), which identified the following factors in determining "rea-

sonable expectations" in a due process context: (1) whether the plaintiff operated in a highly regulated industry; (2) whether the plaintiff knew of the problem at the time it engaged in the activity; and (3) whether the plaintiff could have 'reasonably anticipated' the possibility of such regulation in light of the regulatory environment at the time of purchase. *Id.* at 1348. The court of appeals noted that coal mining is "obviously 'a highly regulated industry.' " App. 15a (*quoting Rith II*, 270 F.3d at 1351). Next, it concluded that "there is no suggestion here that Appolo was unaware that surface mining was a potentially environmentally hazardous activity." *Id.* at 15a-16a. And finally, the Federal Circuit held that SMCRA "*gave notice sufficient to defeat Appolo's reasonable expectations by providing for a process by which OSM could designate lands as unsuitable for mining under a broad array of circumstances.* Appolo has identified no regulatory decision pursuant to SMCRA that would have suggested that the LUM Petitions were unavailable in the circumstances such as the ones here." *Id.* at 17a (emphasis added) (citation omitted).

That is a stunningly broad holding. Under the Federal Circuit's decision, any party who purchased after 1977 land containing coal reserves—or will purchase such land in the future—is prevented from having a reasonable expectation of mining that property. The ruling effectively insulates from Fifth Amendment challenge all lands unsuitable decisions rendered with respect to property purchased after 1977 "no matter how extreme or unreasonable" the decision. *Palazzolo*, 533 U.S. at 627. That result is plainly contrary to this Court's decisions.

At least two state supreme courts have declined to apply any similar across-the-board restriction on takings claims brought by property owners adversely affected by a LUM decision. In *Machipongo Land and Coal Co., Inc.* v. *Commonwealth*, 799 A.2d 751 (Pa.), *cert. denied*, 537 U.S. 1002

(2002), the Supreme Court of Pennsylvania held that the transfer of title after 1977—indeed, even after the LUM decision had issued—did not preclude a takings claim. Likewise, in *State ex rel. RTG, Inc.* v. *State*, 780 N.E.2d 998 (Ohio 2002), a coal operator acquired property after 1977 that was later declared unsuitable for mining. The Ohio Supreme Court held that this LUM decision effected a regulatory taking entitling the coal operator to compensation. Thus whether a property owner may challenge as an unconstitutional taking a LUM decision under SMCRA will depend on which state the property is located in—not due to differences in state property law, but instead due to courts' differing interpretations of this Court's decision in *Palazzolo*.

II. THE COURT OF APPEALS MADE IMPROPER SUA SPONTE DETERMINATIONS IN REFORMULATING THE "RELEVANT PARCEL."

Given the importance of the relevant parcel determination to the outcome of a takings case, confusion resulting from the lack of a clear standard for determining the relevant parcel has a tremendous impact on property owners. Yet confusion currently reigns supreme. The plaintiff, the defendant, the Court of Federal Claims, and the Federal Circuit *each* proposed their own "relevant parcel" in this case, and both courts adopted relevant parcels without taking or considering evidence thereon from either side. Allowing the Federal Circuit's decision to stand would force parties to a takings action opposing summary judgment to not only defeat the argument advanced by their opponents, but also address any and all permutations of "relevant parcel" findings that the court might construct to support an award of summary judgment.

The "relevant parcel" is a question of fact. *Walcek* v. *United States*, 303 F.3d 1349, 1354 (Fed. Cir. 2002). And

there is no doubt that, the Court of Federal Claims having declined to adopt either parcel advocated by the parties, a question of fact existed as to the composition and definition of the parcel. That notwithstanding, both the Court of Federal Claims and the Federal Circuit improperly decided this disputed question against Appolo—the nonmovant—in granting judgment for the Government and affirming the judgment on appeal.

The Government sought summary judgment in the Court of Federal Claims on the theory that all coal possessed by Appolo on the date of the LUM decision, no matter the location or when it was acquired, constituted the "relevant parcel." Because the Government moved for summary judgment on a completely untenable "relevant parcel" theory, Appolo in its opposition did not submit any competing proof of valuation, instead simply pointing out that the Government's approach was wrong as a matter of law. Appolo also noted in its opposition its contention that the petition area would properly constitute the relevant parcel.

The Court of Federal Claims agreed with Appolo that the Government should not receive summary judgment on its proposed "relevant parcel." App. 42a. Appolo had therefore satisfied its burden to "show either that the movant did not establish that it is entitled to judgment on undisputed facts or on the opposer's version of the facts, or that there are material issues of fact which require resolution at trial." *Vivid Tech., Inc.* v. *American Science & Eng'g, Inc.*, 200 F.3d 795, 807 (Fed. Cir. 1999).

But the Court of Federal Claims did not stop there. It improperly created a new "relevant parcel"—despite not having taken or considered any evidence as to the parcel's composition—and granted summary judgment in the Government's favor. That was plainly wrong. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 326 (1986). As other circuits—including the

Federal Circuit—repeatedly have held, *sua sponte* findings of fact are generally improper at the summary judgment stage—particularly when the findings result in judgment against the nonmoving party. *Weiss* v. *Reebok Int'l, Ltd.*, 91 Fed. Appx. 683, 690 (Fed. Cir. 2004) (court wrongly entered summary judgment on grounds not raised in party's motion without providing opportunity for nonmovant to respond); *John Deere Co.* v. *Am. Nat'l Bank, Stafford*, 809 F.2d 1190, 1192 (5th Cir. 1987) ("[A] district court may not grant summary judgment *sua sponte* on grounds not requested by the moving party."); *Brock* v. *Carroll*, 107 F.3d 241, 247 (4th Cir.) ("District courts are not strictly bound to specific grounds urged in motions for summary judgment; they may consider others *sua sponte*, but they should do so only after insuring that the nonmovant has had a fair opportunity to contest the grant on that ground."), *cert. denied*, 522 U.S. 924 (1997); 10A Charles A. Wright, Arthur R. Miller & M.K. Kane, Federal Practice and Procedure: Civil § 2719 at 314-315 (3d ed. 1988).[3]

The Federal Circuit only compounded the problem; not only did it affirm the Court of Federal Claims's grant of summary judgment, it made its own factual findings and created the *fourth* proposed relevant parcel in this case.[4]

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[3] *But see Wilder* v. *Prokop*, 846 F.2d 613, 626 (10th Cir. 1988) (finding district court ruling against nonmoving party on claim not raised in summary judgment motions proper because facts were fully developed and the nonmoving party suffered no prejudice).

[4] In so doing, the Federal Circuit erroneously attributed to Appolo a concession that it did not make, *i.e.*, the inclusion of two of its leases in the relevant parcel even though counsel was specifically questioned on this at oral argument and denied making that concession. *See* Fed. Cir. Br. 39 (conceding inclusion of two leases only *arguendo*).

The Federal Circuit's decision violates basic principles of summary judgment. Allowing the opinion to stand would force parties opposing summary judgment to not only defeat the argument advanced by their opponents, but also address any and all *potential* arguments that the court might invent to support an award of summary judgment. This is plainly wrong.

The substance of the "relevant parcel" decision—in addition to the improper process by which the decision was rendered—independently warrants review. The disagreement between the parties (and the Court of Federal Claims and the Federal Circuit) over the proper relevant parcel stems from the longstanding uncertainty over the proper choice of the "denominator" in a takings analysis—one of the most persistently difficult issues in takings jurisprudence. Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 705 (1996); John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1537 (1994). The courts below cited various cases for the proposition that a plaintiff may not "sever" his property in order to claim a taking in the severed portion.[5] App. 41a. But this Court has applied the "severance" rule only to cases of "vertical" severance, *i.e.*, division of a single property into the various "strands" or "sticks" making up the "bundle of rights" constituting real property. *See, e.g.*, *Keystone Bituminous Coal Ass'n* v. *DeBenedictus*, 480 U.S. 470 (1987) (right of support not separately analyzed for takings analysis); *Tahoe-Sierra*, 535 U.S. 302 (finding it improper to sever temporal interest in property).

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[5] *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 130 (1978); *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 644 (1993); *Tahoe-Sierra*, 535 U.S. at 330.

The present case involves the more difficult question of "horizontal" or geographic severance, on which this Court has not yet spoken. The lack of guidance on the issue of horizontal division has resulted in differential treatment of the issue: in some cases, courts treat the regulated parcel alone as the "parcel as a whole";[6] in others—such as this one—the "parcel as a whole" rule is used to prohibit consideration of the regulated parcel. Until this Court speaks on the issue, this confusion will persist and property owners will be unable to rely upon the rights they thought they possessed in their property.

III. THE FEDERAL CIRCUIT IMPROPERLY TREATED GENERAL LEGISLATIVE FINDINGS AS CONCLUSIVELY INSULATING THE REGULATION FROM TAKINGS CHALLENGE.

The Federal Circuit's opinion immunizes swaths of government action from any challenge under the Fifth Amendment. The court foreclosed takings lawsuits by broadening the requirement that a takings claimant admit the government acted within its authority to mean that the claimant must concede that the government's action was both lawful *and* reasonably related to its professed purpose. *But see Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (application of regulation constitutes a taking if regulation "does not substantially advance legitimate state interests"). If left standing, agency decisions that take private property will nonetheless be declared immune from challenge under this vastly expanded version of the law.

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[6] *Florida Rock Indus., Inc.* v. *United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); *Whitney Benefits, Inc.* v. *United States*, 18 Cl. Ct. 394, 405 (1989), *aff'd*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991); *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994).

This Court allows takings claimants to challenge the ostensible basis of the regulation as part of their takings case. *See, e.g.*, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (noting that the "Takings Clause requires courts do more than insist upon artful harm-preventing characterizations" by legislators).[7] It is clear that a takings plaintiff can file suit without first obtaining a ruling in a district court "as to the lawfulness of the government conduct at issue." *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1367 (Fed. Cir. 1998).

While a takings plaintiff must concede the "correctness" of an agency action, that "correctness" consists only of the government's authorization to act. The claimant *does not* concede the lawfulness of the agency action. *Id.* at 1362-1363, 1365. (requirement to concede "correctness" is only concession of government's authorization to act).

Furthermore, this presumption of accuracy only applies when the agency action is an "*explicit adjudication of the scope of the [claimant's] property rights.*" *Id.* at 1366. Plainly no such "adjudication" occurred in the LUM proceeding. The lands unsuitable for mining process "is legislative, rather than adjudicatory, in nature." *Prager* v. *Hodel*, 793 F.2d 730, 732 (5th Cir.), *cert. denied*, 479 U.S. 988 (1986) (citing 44 Fed. Reg. 15,003-04 (1979) (discussing legislative nature of unsuitability determination under regulations)). The LUM petition proceeding was not directed at Appolo or its mining plan specifically, but instead was directed at a

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[7] *See also Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987); *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), illustrating that this Court has not felt compelled to accept the justifications set forth by a legislature, city council, zoning board or other rule-promulgating body in considering Fifth Amendment challenges.

geographic area. In analyzing the Fern Lake Petition, OSM thus considered only the possible impact to the watershed of a hypothetical mine using contemporary mining practices. No burden of proof applies because "the Petition process resembles long range planning, and provides for the weighing and balancing of many factors. The regulatory authority is required to consider many competing interests." 48 Fed. Reg. 41,312, 41,337 (Sept. 14, 1983). And OSM may declare lands "unsuitable" if mining will be incompatible with local land use plans, 30 U.S.C. 1272(a)(3)(A)), or if it "could"—not will, or even probably will—result in certain enumerated harms. 30 U.S.C. § 1272(a)(3)(B),(C) and (D).

The Federal Circuit and the Court of Federal Claims concluded that OSM's legislative findings in the LUM proceeding as to the possible effects of a hypothetical mine were binding upon Appolo as to the effects of Appolo's particular mining plan. App. 18a & n.7 and 65a. Based solely upon OSM's unchallenged legislative findings, the Court of Federal Claims held that the LUM decision equated to abatement of a common law nuisance, shielding the government from takings liability. The Federal Circuit similarly held the findings inviolate, but, disregarding the nuisance issue, found the LUM action tantamount to an exercise of the " 'police power directed at protecting the safety, health, and welfare[8] of the communities surrounding the * * * mine site by preventing harmful runoff [into local water supplies],' " App. 18a (*quoting Rith II*, 270 F.3d at 1352), thus requiring no compensation. But treating OSM's findings as conclusive of Appolo's rights was plainly wrong.

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[8] Quite apart from the question of whether the LUM findings are binding on the court and Appolo, the Federal Circuit's characterization of the OSM rationale as protective of public "health and safety" is simply erroneous. OSM did not rely upon public health and safety as grounds for its decision. Fed. Cir. Reply Br. 20 n.14.

Although previously *adjudicated* facts are binding in a subsequent takings case, *see, e.g.*, *Rith Energy, Inc.* v. *United States*, 247 F.3d 1355, 1364-1365 (Fed. Cir. 2001); *M&J Coal Co.* v. *United States*, 47 F.3d 1148, 1154 (Fed. Cir., *cert. denied*, 516 U.S. 808 (1995), as are findings which are essential to the government's authorization to act, *see Florida Rock*, 791 F.2d at 905 (holding Corps of Engineers's *de jure* pollution findings essential to its jurisdiction, *i.e.*, its authorization to act), OSM's findings in the LUM proceeding were not based on an adjudication of Appolo's plan nor were they necessary to the validity of the mining ban.[9] Therefore these findings cannot, consistent with due process, bind Appolo in this case. *See, e.g.*, *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971) ("Normally, when a[n] * * * administrative agency is about to take action adverse to a citizen, * * * due process entitles the citizen at some stage to have notice, to be informed of the facts on which the agency relies, and to have an opportunity to rebut them." (citing, *inter alia*, *Londoner* v. *City & County of Denver*, 210 U.S. 373 (1908)). Nevertheless, both the trial court and the Federal Circuit denied Appolo any opportunity to challenge OSM's generalized findings.

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[9] While certain generic findings are necessary to support a LUM decision, the Director of OSM has discretion and the LUM decision would be well within his legal authorization to act even if some of the particular findings as to water quality were not well founded. *See* 30 U.S.C. § 1272(a)(3), *Del-Rio*, 146 F.3d at 1362-1363. The LUM petitioners advanced, and the Director relied upon, several grounds to support the ban on mining, including the potential of mining to "affect fragile or historic lands" and cause "damage to important * * * scientific or esthetic values or natural systems," as well as to conflict with "existing state or local land use plans." Fed. Cir. Joint App. 185-196. This case is therefore unlike *Florida Rock*, where the government's sole basis for acting was a finding that pollution would result from the claimant's proposed activities. *Id.* at 898.

In applying the OSM's findings here, the Federal Circuit evidently confused Appolo's situation with the plaintiff's in *Rith Energy, Inc.* v. *United States*, 270 F.3d 1347 (Fed. Cir. 2001) (*Rith II*). App. 18a n.7. The plaintiff in *Rith* had been granted a permit, his actual mining practices were shown to produce acid mine drainage, and then he had several opportunities to fully litigate the issues before he was ultimately precluded from mining. *Id.* at 1352. Appolo, by contrast, has had *no* opportunity to present any evidence that its *specific* mining plan would not endanger health or safety, and no facts relating to its specific mining plan were at issue in the LUM proceeding. *See* Fed. Cir. Joint App. 1335 (Appolo engineer noting that they were "never given an opportunity to prove what [they] could do"); Fed. Cir. Reply Br. 20 n.14. By treating OSM's legislative findings as a "prior adjudication" of Appolo's particular plan, the Federal Circuit's decision impermissibly deprived Appolo of its right to due process as provided by law. *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976).

More important, by treating the OSM Director's unilateral findings as conclusively determining the character of the government action for takings purposes, the Federal Circuit permitted the government the luxury of conclusively foreclosing any takings challenge simply by including in an agency finding the statement that the regulation has a general purpose such as enhancing the "public health and welfare." This ruling, if not addressed by this Court, will effectively vitiate the Fifth Amendment's protection against uncompensated taking of private property.

Precedent in this Court, as well as the Federal Circuit, does not support such a broad rule of incontestability. *See Del-Rio*, 146 F.3d at 1362-1367. Thus, governmental action may be legally flawed—even subject to reversal on direct challenge—but still constitute the basis for a claim under the Tucker Act. *Id.*

Appolo never sought to prove that the LUM decision was invalid or unauthorized. It merely sought to show that its own specific mining plan (which was not addressed by the LUM decision) would have obviated the water quality concerns expressed in the LUM findings, and that the decision itself was not aimed squarely at public health and safety in view of the actual, probable impacts of mining the coal in the Fern Lake watershed. Appolo's "Tucker Act complaint therefore cannot be viewed as simply a collateral challenge to a * * * determination made by the agency." *Del-Rio*, 146 F.3d at 1366.

Appolo is entitled to an adjudication of its property rights—the day in court it has never received. In an adjudication, unlike the LUM proceeding, the particular facts affecting a property owner's status and entitlement to compensation are evaluated and decided, and those facts as found by the adjudicative body are binding in any subsequent takings case.[10] *See, e.g.*, *Rith Energy*, 247 F.3d at 1358, 1364-1365 (noting Rith's "several unsuccessful administrative and judicial challenges" prior to suit in the Court of Federal Claims, and that ALJ and Court of Federal Claims findings supported specific finding that Rith's practices endangered health or safety); *M&J Coal Co.*, 47 F.3d at 1154 (observing that actual mining practices caused subsidence and ALJ found plaintiff's mining posed threat to health and safety).

No one has ever considered Appolo's proposed activity or the ease with which Appolo could prevent any harm from its mine. OSM's legislative findings were not based on Ap-

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[10] While the issue does not appear to have arisen in federal court, state courts have not considered LUM findings to have any impact on an individual plaintiff's takings claim. *See Machipongo Land and Coal Co.*, 799 A.2d at 771; *State ex rel. RTG, Inc.* v. *Ohio*, 780 N.E.2d at 1005.

polo's plan and did not make any conclusions about the effects of Appolo's proposed mine. OSM's generic findings cannot, consistent with due process, bind Appolo in this case, or preclude a Fifth Amendment challenge. The government itself may not conclusively determine the nature of its action with "artful harm-preventing characterizations." *Lucas*, 505 U.S. at 1025 n.12.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES R. GOLDEN
P.O. BOX 1400
1914 CUMBERLAND AVENUE
MIDDLESBORO, KENTUCKY
(606) 248-2766

Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-5088

APPOLO FUELS, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appealed from: United States Court of Federal Claims
Judge Christine O.C. Miller

DECIDED: August 30, 2004

BEFORE SCHALL, DYK, and PROST, *Circuit Judges*.
DYK, *Circuit Judge*.

Appellant Appolo Fuels, Inc. ("Appolo") seeks recovery for both a permanent and a temporary regulatory taking of its surface mining leases. It claims that a permanent taking occurred when the Office of Surface Mining Reclamation and Enforcement ("OSM") designated the lands subject to its leases as unsuitable for mining pursuant to 30 U.S.C. § 1272. Alternatively, Appolo seeks compensation for a temporary taking allegedly resulting from extraordinary delay in OSM's decisionmaking process. The Court of Federal Claims granted summary judgment in favor of the government. *Appolo Fuels, Inc.* v. *United States*, 54 Fed. Cl. 717 (2002). We affirm.

BACKGROUND

Congress passed the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or the "Act"), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. § 1201 et seq.), to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a) (2000). The Supreme Court has upheld the constitutionality of the SMCRA. *Hodel* v. *Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981).

Before the enactment of SMCRA, "many surface mining operations result[ed] in disturbances of surface areas that . . . destroy[ed] or diminish[ed] the utility of land," among other things, "by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats . . . and by counteracting the governmental programs and efforts to conserve soil, water, and other natural resources." 30 U.S.C. § 1201(c). In order to remedy the negative effects of surface mining, SMCRA established a permitting process. The Act required organizations to obtain a permit from the Secretary of the Interior or the relevant state authority before "engag[ing] in or carry[ing] out on lands within a State any surface coal mining operations."[1] *Id.*

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[1] In states that maintain a state SMCRA implementation and enforcement program under 30 U.S.C. § 1235(d), an organization

§ 1256(a). Standards were established governing the grant or denial of permits. *Id.* § 1265. SMCRA established the OSM in the Department of the Interior and gave it authority to administer the Act. *Id.* § 1211.

SMCRA further provided that the Secretary of the Interior or the relevant state authority, depending on which entity is responsible for the enforcement of SMCRA in the particular region, had discretion "[u]pon petition pursuant to subsection (c) of this section, [to] designate an area as unsuitable for all or certain surface coal mining," *Id.* § 1272(a)(2), if such surface mining would, among other things, "affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply," *id.* § 1272(a)(3).

The process for designating an area as unsuitable for mining begins with the filing of a petition by "[a]ny person having an interest which is or may be adversely affected" by such mining, *Id.* § 1272(c). The regulatory authority must then hold "a public hearing in the locality of the affected area" within ten months of providing "appropriate public notice and publication of the date, time and location of such hearing." *Id.* Finally, the regulatory authority must "[w]ithin sixty days after such hearing, issue and furnish . . . a written decision regarding the petition, and the reasons therefore." *Id.* This procedure is known as the "LUM" (lands unsuitable for mining) petition process. The statute thus contemplates that the LUM procedure will be completed approximately one year after giving public notice of the filing of the LUM petition (i.e., ten months plus sixty days). In Tennessee the SMCRA is

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must obtain the § 1256 permit from the state. 30 U.S.C. § 1256(a); *see also id.* § 1254. Where "the Secretary has promulgated a Federal program [to implement SMCRA] for a State not having a State program," an organization must obtain a permit from the Secretary of the Interior. *Id.* § 1256(a). In this case, OSM assumed Tennessee's state SMCRA program in accordance with 30 U.S.C. § 1254(b). *See Rith Energy, Inc.* v. *United States*, 247 F.3d 1355, 1359 (Fed. Cir. 2001).

implemented by the federal Department of the Interior, *see supra* note 1, and the Secretary of the Interior has "delegated to the Director of OSM the authority to make final decisions on land unsuitable petitions." (J.A. at 185.)

Appolo is a Kentucky corporation that entered the mining business in 1972. During the late 1980s, Appolo became aware that its existing coal reserves would be exhausted by the mid 1990s, and it sought to acquire more lands on which to mine. Appolo particularly sought reserves in the Little Yellow Creek watershed (also known as the Fern Lake watershed), a 4,544-acre area situated on the Tennessee-Kentucky border within close proximity to its existing operations, 3,780 acres of which fell within Tennessee. The Tennessee portion of the Little Yellow Creek watershed included within its bounds Fern Lake, which served as the water supply for the city of Middlesboro, Kentucky. In 1989, more than a decade after the enactment of SMCRA, Appolo acquired lease 5A, providing mining rights in approximately 2,600 acres of land within the Yellow Creek watershed. Later that year, Appolo obtained further mining rights in the Little Yellow Creek watershed by acquiring lease 7A. Then in 1992, Appolo purchased 600 acres immediately surrounding Fern Lake in Tennessee.

On February 8, 1994, Appolo filed a SMCRA permit application with OSM to mine 214 acres on its leased land in the Tennessee part of the Little Yellow Creek watershed. Shortly thereafter, the City of Middlesboro, Kentucky, and the National Parks and Conservation Association filed a LUM petition with OSM, requesting that all 3,780 acres of land in the Tennessee portion of the Little Yellow Creek watershed ("the petition area") be designated as lands unsuitable for mining. At the time the petition was filed, the only interests held by Appolo within the petition area were the portion of lease 5A in the Tennessee part of the Little Yellow Creek watershed and 367 acres of Appolo's 600-acre fee-simple parcel surrounding Fern Lake. Subsequently on March 30, 1994, OSM notified Appolo that its permit application was "administratively complete" but, in accordance with 30 C.F.R. § 764.15, the application would be held in abeyance until the

LUM petition was decided. (J.A. at 215.) The agency further explained that "if OSM reaches a decision to designate parts of the petition area as unsuitable for all or certain types of mining operations, your application could not be approved." (J.A. at 215.) OSM proceeded with the LUM petition review process, which involved preparation of a petition evaluation document ("PED") and an environmental impact statement ("EIS") as required by the SMCRA, 30 U.S.C. § 1272(d), and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000).

Meanwhile, in furtherance of its plan to mine the Little Yellow Creek watershed, Appolo acquired lease 14A in February 1995, consisting of approximately 3,200 acres adjacent to lease 5A, approximately 2,300 acres of which were located in the LUM petition area. This lease explicitly recognized that the existing LUM petition could impact a portion of the acreage covered by the lease. Appolo added lease 15A in February 1996, and leases 16A and 17A in June 1996, all of which were adjacent to leases 5A and 14A. Only a small part of the acreage of leases 15A, 16A and 17A was within the LUM petition area.

In May of 1995, Appolo wrote to OSM, inquiring as to the "delay" in OSM's processing of the LUM petition. In response, OSM explained that it was in the process of developing a PED and an EIS for the contested area and that "OSM has not 'intentionally delayed' " this process. (J.A. at 253-54.) Rather, the process had been delayed by a combination of unusual environmental conditions that inhibited access to water samples necessary for the PED and EIS as well as a heavy workload in the OSM field office.

After publishing a draft PED and EIS in the Federal Register in January 1996, OSM issued a final decision on the LUM petition, designating "the entire petition area as unsuitable for all surface coal mining operations" on September 13, 1996. (J.A. at 185.) The Director of OSM described the findings of the PED and EIS that informed his LUM decision:

> Surface coal mining . . . conducted within the Fern Lake watershed would significantly impair the water quality of Fern Lake by altering both the physical and chemical characteristics of the water. If surface coal mining operations occurred, chemical changes to the water are predicted to last several hundred years.
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> . . . .
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> . . .Furthermore, no other domestic water supply of the same quality was identified which it would be economically feasible for the city to utilize.

(J.A. 193-94.) The Director explained that his "most important consideration [in granting the petition] was the impact of surface coal mining operations in the petition area on productivity of the Fern Lake water supply." (J.A. at 196.) Appolo later acquired two more leases containing mining rights within the area designated as unsuitable for mining: lease 18A in September 1997 and lease 19A in August 2001.

In November 1996, Appolo filed a petition for review of OSM's LUM decision in the United States District Court for the Eastern District of Tennessee pursuant to 30 U.S.C. § 1276. *Appolo Fuels, Inc.* v. *Babbitt*, No. 3:96-CV-952 (E.D. Tenn. Nov. 12, 1996). The district court, however, dismissed the case without prejudice in July 1998 upon Appolo's motion.

Appolo filed this suit in the Court of Federal Claims in January 2000, alleging that OSM's LUM decision constituted a categorical regulatory taking of Appolo's mining interests in the petition area, including portions of leases 5A, 7A, 14A, 15A, 16A, 17A, and 18A, or, in the alternative, that the LUM decision constituted a partial regulatory taking of these mining interests. Appolo also claimed that OSM improperly delayed its decision on the LUM petition beyond the twelve-month period established in 30 U.S.C. § 1272(c), thereby effecting a temporary taking.

Following discovery, the government moved for summary judgment on May 17, 2002. A primary focus of the parties' dispute concerned the relevant parcel for purposes of the

takings analysis. The government argued that the relevant parcel was all of Appolo's "coal interests in the petition area and surrounding areas controlled by lease or fee ownership," including the entirety of leases 5A, 7A, 14A, 15A, 16A, 17A, 18A, and 19A. Def.'s Mot. for Summ. J. & Mem. of Law at 34, *Appolo Fuels, Inc.* v. *United States*, No. 00-1L (Fed. Cl. May 20, 2002). Appolo argued instead that the "the facts at present weigh in favor of using [only] the property which was subject to the LUM decision as the denominator," that is the portion of leases 5A, 14A, 15A, 16A and 18A fully within the petition area. Pl.'s Combined Br. in Op. to Def.'s Mot. for Summ. J. & In Limine at 29, *Appolo Fuels, Inc.* v. *United States*, No. 00-1L (Fed. Cl. Sept. 5, 2002). Appolo urged that "[w]ith respect to the 14A Lease . . . approximately 92% of the tonnage has been lost [and] [o]n the 5A, the percentage is 78%." *Id.* at 49.

The Court of Federal Claims entered summary judgment in favor of the government on December 18, 2002. *Appolo*, 54 Fed. Cl. at 717. The court held that the relevant parcel for the takings analysis could not be limited to the petition area as urged by Appolo. The court, however, also rejected the government's assessment of the relevant parcel, explaining that leases 18A and 19A must be excluded because they were purchased after the LUM decision and that lease 7A must be excluded because "both plaintiff's and defendant's experts agree that the lease provided plaintiff with no reserves with any economic value." *Id.* at 729. Following case law that requires a court to consider a plaintiff's overall business plan in determining the relevant parcel, the court included within the relevant parcel the entirety of leases 5A, 14A, 15A, 16A and 17A as well as Appolo's 600 fee simple acres around Fern Lake because it found that Appolo "viewed [these interests] as part of its overall plan to mine within the Creek watershed." *Id.* at 728-30.

Based on this definition of the relevant parcel, the court rejected Appolo's categorical takings claim because the "plaintiff was not prohibited from exploiting its leases and its

fee property in areas outside the petition area," and these portions had value. *Id.* at 732.

Likewise, the Court of Federal Claims rejected Appolo's partial regulatory takings claim. In reaching this decision, the court considered the three *Penn Central* factors applicable to the partial regulatory takings analysis: the plaintiff's reasonable investment-backed expectations; the character of the government action allegedly effectuating a taking; and the economic impact of the alleged taking. *See Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 124-25 (1978). Relying on our decisions in *Rith Energy, Inc.* v. *United States*, 247 F.3d 1355 ("*Rith I*"), *reh'g denied*, 270 F.3d 1347 (Fed. Cir. 2001) ("*Rith II*"), the court held that Appolo lacked reasonable investment-backed expectations:

> Plaintiff commenced its effort to obtain coal mining rights in the [Little Yellow] Creek watershed with the acquisition of Lease SA in 1989. Thus, this lease was acquired more than ten years after the enactment of SMCRA. The two amendments to Lease 14A expressly stated that a [LUM] petition was pending. Plaintiff's argument that [LUM] petitions are "extraordinary" remedies is unavailing, given that plaintiff has not claimed that it was unaware of the possibility of a [LUM] petition; moreover, such an argument would be disingenuous in light of plaintiff's self proclaimed status as a 20-year veteran of negotiating the SMCRA permitting process. . . . [Plaintiff] cannot deny that the temporal relationship between the enactment of SMCRA and the time it purchased the parcel at issue gave it notice that it was subject to regulation.

Appolo, 54 Fed. Cl. at 733-34. The court also held that the character of the government action cut against Appolo's partial takings claim because mining in the petition area would have constituted a nuisance under Tennessee law, explaining:

> It is clear that water pollution is an abatable nuisance under both Tennessee common law and the [Tennessee Water Quality Control Act of 1977]. By granting the [LUM] petition, OSM exercised its police power to protect

> its citizens from a nuisance, thereby weighing this factor of the *Penn Central* analysis in the Government's favor.

Id. at 735. As to the economic impact prong of the *Penn Central* analysis, the court held that given the investment-backed expectations and nuisance findings, "even a showing of severe diminution in economic value will not result in a compensable partial regulatory taking." *Id.* However, the court continued, even if it had decided that Appolo had legitimate investment-backed expectations and that mining the petition area would not have constituted a nuisance, Appolo still would have "put forth an insufficient showing to generate a genuine issue of fact as to the economic impact prong of the *Penn Central* analysis" because it did not submit any evidence "that it cannot exploit the portions of its leases that lie outside the petition area." *Id.* at 736.

Finally, the Court of Federal Claims rejected Appolo's temporary takings claim, applying the analytic framework established by the Supreme Court in *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2002), and by our court in *Wyatt* v. *United States*, 271 F.3d 1090 (Fed. Cir. 2001). The court held that OSM's total delay was approximately one year and "[t]o characterize such a delay as extraordinary would not be consistent with the import of Supreme Court and Federal Circuit precedent." *Appolo*, 54 Fed. Cl. at 738.

Appolo appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the Court of Federal Claims' grant of summary judgment without deference. *Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 799 (Fed. Cir. 1993).

A

Appolo first contends that the Court of Federal Claims erred in rejecting its categorical takings claim. In order to warrant compensation for a categorical taking, a plaintiff must show that the regulation at issue has denied it of "*all* economically

beneficial or productive use" of its whole parcel of land. *See Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (emphasis added). Appolo argues that the Court of Federal Claims rejected its categorical takings claim based on a mischaracterization of the relevant parcel and that there was a categorical taking under a proper definition of the relevant parcel. We disagree. Even if the Court of Claims' definition of the relevant parcel was overly broad, an issue we do not decide, Appolo still cannot recover on its categorical takings claim.

The Supreme Court has long held that the regulatory takings analysis, with respect to both categorical takings and partial takings, must be applied to the "parcel as a whole." *Penn Central*, 438 U.S. at 130-31. The Court of Federal Claims properly rejected Appolo's argument that the relevant parcel should have included only those portions within the petition area. The Supreme Court explained in *Tahoe-Sierra* that "defining the property interest taken in terms of the very regulation being challenged is circular" and emphasized that the Court has "consistently rejected such an approach to the 'denominator' question." 535 U.S. at 331. On appeal, Appolo appears to have abandoned this argument, instead arguing that only leases 5A and 14A should have been included. Appolo concedes that it "will not quibble with the court's inclusion of its 5A or 14A Leases as part of the 'relevant parcel'." (Br. for Appellant at 39-40.) This concession is well taken because lease 5A's and lease 14A's "profitable reserves were the focus of Appolo's expectations," (Reply Br. for Appellant at 9), and were purchased as a discrete mining unit. Appolo purchased lease 5A in 1989 as the first step in fulfilling its "expect[ation] that [it] would ultimately acquire and mine all of the surface mineable coal within the Little Yellow Creek watershed," (Br. for Appellant at 10-11), and "Appolo continued its plans for mining within the Fern Lake watershed by acquiring the 14A Lease in February 1995," (*id.* at 17). Under our precedent, the purchase of these two leases as part of one unified mining plan is sufficient to include them in the relevant parcel. *See Forest Props., Inc.* v. *United States*, 177 F.3d 1360, 1365-66 (Fed.

Cir. 1999) (holding that relevant parcel included two tracts of land because their "development was treated as a single integrated project," despite the fact that they were "acquired . . . in different transactions at different times, that different local government authorities had regulatory jurisdiction over the two locations, and that the two segments were capable of separate development"); *see also Palm Beach Isles Assocs.* v. *United States*, 208 F.3d 1374, 1381 ("*Palm Beach I*") (focusing the relevant parcel analysis on whether the owner "planned to develop the parcels as a single unit"), *aff'd on reh'g*, 231 F.3d 1354, *reh'g en banc denied*, 231 F.3d 1365 (Fed. Cir. 2000).

Because the relevant parcel includes leases 5A and 14A, Appolo is not entitled to compensation for a categorical taking. It did not lose all economically viable use of these leases. Neither lease falls entirely within the LUM petition area. Appolo had the burden in response to the government's summary judgment motion to present evidence of complete loss of value. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325 (1986); *see also Seiber* v. *United States*, 364 F.3d 1356, 1371-72 (Fed Cir. 2004). In opposing summary judgment, Appolo claimed that "[w]ith respect to the 14A Lease . . . approximately 92% of the tonnage has been lost. On the 5A, the percentage is 78%." Pl.'s Combined Br. in Op. to Def.'s Mot. for Summ. J. & In Limine at 49. But Appolo's expert appraiser only valued the reserves within the petition area. *Id.* And, indeed, Appolo admitted that it did not even instruct its expert to assess the before and after value of this area. *Id.* at 20. Even assuming these percentages are correct, Appolo's showing was insufficient to defeat summary judgment on the categorical takings claim. The Supreme Court has made clear that a categorical taking only occurs when there has been a "complete elimination of value or a total loss" and that "the categorical rule would not apply if the diminution in value were 95% instead of 100%." *Tahoe-Sierra*, 535 U.S. at 330 (internal quotation marks omitted); *see also Rith II*, 270 F.3d at 1349-50 (holding that a loss of 90% of available coal did not constitute a categorical taking). A showing of a 92% loss of

the value of one lease and a 78% loss of the other is manifestly insufficient.

B

Having rejected Appolo's contention that there has been a categorical regulatory taking, we turn to the partial regulatory takings question.

It is a settled principle of federal takings law that under the *Penn Central* analytic framework, the government may defend against liability by claiming that the regulated activity constituted a state law nuisance without regard to the other *Penn Central* factors. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 352; *Lucas*, 505 U.S. at 1010; *Mugler* v. *Kansas*, 123 U.S. 623, 662-69 (1887); *Palm Beach I*, 208 F.3d at 1383; *M & J Coal Co.* v. *United States*, 47 F.3d 1148, 1153 (Fed. Cir. 1995); *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994); *Fla. Rock Indus.* v. *United States*, 18 F.3d 1560, 1565 n.10 (Fed. Cir. 1994). Appolo concedes this principle, but it argues that the Court of Federal Claims mistakenly held that OSM's LUM decision established existence of a nuisance under Tennessee common law.[2] Appolo argues that OSM did not make a nuisance determination and, in any event, was not empowered to make such a determination as "the LUM decision [and] concomitant 'findings' are made on a different standard than that which applies to the nuisance question in a takings claim." (Br. for Appellant at 31.) Rather, Appolo contends, the Court of

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[2] OSM's LUM decision concluded:

> [Appolo's] surface coal mining operations in the petition area would affect the renewable resource lands in that area and result in a substantial loss in long-range productivity of Fern Lake, which serves as the Middlesborough public water supply. Surface mining would alter the physical and chemical properties of the water stored in the lake. . . . Mining in the petition area would cause this loss in productivity even if conducted in full compliance with the environmental performance standards of SMCRA.

(J.A. at 195-96.)

Federal Claims was obligated to determine de novo whether surface mining in the petition area would have constituted a nuisance under Tennessee law. We find it unnecessary to resolve this question because we conclude that there has been no taking under the *Penn Central* analysis, quite apart from the nuisance defense.[3]

As noted above, the *Penn Central* analysis requires us to consider: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Cent.*, 438 U.S. at 124. These factors are considered in terms of the "parcel as a whole." *Id.* at 130-31.

First, we consider the economic impact of the alleged partial regulatory taking. For purposes of this analysis, we assume the accuracy of Appolo's claim that it lost approximately 78% of lease 5A's value and 92% of lease 14A's value.[4] Even so, we conclude in light of the other two *Penn Central* factors that there has been no partial regulatory taking.

We address first the reasonable investment-backed expectations prong of the *Penn Central* analysis. As a preliminary matter, we must decide the relevant date for assessing Appolo's investment-backed expectations, and in particular whether the enactment of SMCRA in 1977, before acquisition of the leases in question, defeats Appolo's reasonable investment-backed expectations. In *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001), a five to four decision, the

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[3] Because we affirm the Court of Federal Claims' holding on grounds other than the nuisance theory, Appolo's challenge to the Court of Federal Claims' grant of the motion in limine (which barred Appolo from litigating whether its proposed mining would have constituted a nuisance under Tennessee law) is moot.

[4] However, we note that this valuation does not take into account the fact that Appolo had already mined substantial amounts of reserves in the portions of 5A and 14A outside the petition area and that there were potential underground deposits in both areas that could be exploited.

Supreme Court reversed the Rhode Island Supreme Court's holding that "the postregulation acquisition of title was fatal to [a] claim for deprivation of all economic use" under the Takings Clause, *id.* at 626, holding instead that a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction," *id.* at 630. The majority opinion did not address the bearing of the regulatory environment at the time of land acquisition on the reasonable investment-backed expectations prong of the *Penn Central* analysis. Justice O'Connor, however, explained in her concurring opinion that the Court's "holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis." *Id.* at 633 (O'Connor, J., concurring). Rather, she affirmed that "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations." *Id.*

Shortly before the Court's decision in *Palazzolo*, we decided *Rith I*, which raised similar issues concerning investment-backed expectations. We rejected the takings claim, emphasizing that the plaintiff could not have had "a reasonable investment-backed expectation that it would not be subject to . . . restraints when it acquired the coal leases [because] SMCRA was enacted eight years before [the plaintiff] purchased the coal leases" at issue. 247 F.3d at 1364. After the decision in *Palazzolo*, the plaintiff-appellant in *Rith* filed a motion for rehearing on the theory that it was "entitled to stand in the shoes of its predecessors who owned before SMCRA" because *Palazzolo* taught that "the mere fact that an owner bought after a regulatory scheme was passed cannot defeat a partial takings claim." *Rith II*, 270 F.3d at 1350. We denied the petition for rehearing, explaining that *Palazzolo*, in light of Justice O'Connor's concurrence, only rejected the theory that "a person who purchases property after the date of the regulation may *never* challenge the regulation." *Id.* (emphasis added). We concluded that *Palazzolo* did not reject the principle that "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the

reasonableness of those expectations." *Id.* (quoting *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)). Likewise, we conclude that Appolo's reasonable investment-backed expectations are shaped by the regulatory regime in place as of the date it purchased the leases at issue.

Under such circumstances, our *en banc* opinion in *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327 (Fed. Cir. 2001), instructs us to consider in particular "three factors relevant to the determination of a party's reasonable expectations": (1) whether the plaintiff operated in a "highly regulated industry;" (2) whether the plaintiff was aware of the problem that spawned the regulation at the time it purchased the allegedly taken property; and (3) whether the plaintiff could have "reasonably anticipated" the possibility of such regulation in light of the "regulatory environment" at the time of purchase. *Id.* at 1348.[5] Here each of these factors argues against a finding of reasonable expectations.

First, as we explained in *Rith II*, the coal mining business is obviously "a highly regulated industry." 270 F.3d at 1351. One has to look no farther than the SMCRA itself to reach this conclusion, and the SMCRA's comprehensive statutory and regulatory system has been in effect since Appolo's early years in the industry and predates Appolo's purchases of any of the leases at issue in this litigation. Second, there is no suggestion here that Appolo was unaware that surface mining

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[5] While *Commonwealth Edison* considered reasonable investment-backed expectations in the context of a due process claim, the *Commonwealth Edison* analysis is equally applicable in the takings context. *See Chancellor Manor* v. *United States*, 331 F.3d 891, 904 (Fed. Cir. 2003); *Cienega Gardens* v. *United States*, 331 F.3d 1319, 1346 n.42 (Fed. Cir. 2003). A plaintiff's subjective expectations are irrelevant to the reasonableness of the expectations. *See Cienega Gardens*, 331 F.3d at 1346 n.42 ("We of course agree that a party's subjective expectation is irrelevant to whether that expectation is reasonable."). Nonetheless, the plaintiff must show that it had an actual expectation that it would not be subjected to the regulatory restriction. *Id.* at 1346.

was a potentially environmentally hazardous activity. Third, in light of the regulatory environment at the time Appolo purchased the leases at issue, it could have "reasonably anticipated" the possibility of a LUM decision prohibiting the mining of part or all of its leases. Appolo admits that the existence of the Act should play a role in the investment-backed expectations analysis, stating on appeal that it was acutely familiar with the SMCRA statutory and regulatory system and that it "certainly knew that its land would be fettered by regulation—it had successfully pursued its mining operations for years following SMCRA." (Reply Br. for Appellant at 13; *see also* Br. for Appellant at 7 ("Appolo not only survived SMCRA's passage; it thrived by adapting its methods to the Act's requirement . . . . Its demonstrated competence in complying with SMCRA was a key to formation of its expectations of mining the property at issue.").) Appolo contends, however, that years of practical experience in the mining industry led it to believe that a LUM petition would not be filed in the first instance and once filed, would not be granted by OSM, and that "whether the prospect of such a petition should have impacted Appolo's reasonable expectations is a question of fact for trial." (Reply Br. for Appellant at 14-15.)

Appolo's argument is not convincing. In some circumstances the determination of reasonable expectations may require a factual hearing. *See Chancellor Manor*, 331 F.3d at 904, 906; *Cienega Gardens*, 331 F.3d at 1353. But there are also circumstances where the question of reasonable expectations can be resolved without a factual hearing merely by the examination of the legal regime existing at the time of the action or acquisition. *Commonwealth Edison* was such a case. There we held that determination of reasonable investment-backed expectations "does [not] require an evidentiary trial," 271 F.3d at 1348, because examination of the common law and federal regulations at the time of the activity in question established the absence of reasonable expectations, *see id.* at 1356. This too is a case in which examination of the regulatory regime at the time

Appolo's lease acquisitions occurred is sufficient, and no hearing is required. SMCRA was enacted long before the acquisition of Appolo's leases, and it provides explicitly for LUM determinations. 30 U.S.C. § 1272. The statute gave notice sufficient to defeat Appolo's reasonable expectations by providing for a process by which OSM could designate lands as unsuitable for mining under a broad array of circumstances. *Id.*[6] Appolo has identified no regulatory decision pursuant to SMCRA that would have suggested that the LUM petitions were unavailable in the circumstances such as the ones here. In *Commonwealth Edison* we explained that "[t]he reasonable expectations test does not require that the law existing at the time of processing would impose liability." 271 F.3d at 1357. Rather, "[t]he critical question is whether extension of existing law could be foreseen as reasonably possible." *Id.* Here, the "broad scope" of the SMCRA's LUM provisions made OSM's designation of Appolo's lands as

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[6] Section 1272 states, in pertinent part:

[A] surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will--

(A) be incompatible with existing State or local land use plans or programs; or

(B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems; or

(C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or

(D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

30 U.S.C. § 1272(a)(3).

unsuitable for mining "easily foreseen, not necessarily as a certainty, but as a reasonable possibility." *Id.*

Finally, under *Penn Central* we consider the character of OSM's decision to declare the Tennessee portion of the Little Yellow Creek watershed as unsuitable for mining. Relying on findings in the PED and EIS, OSM concluded that surface mining in the Little Yellow Creek watershed "would significantly impair the water quality of Fern Lake . . . [effecting] chemical changes to the water [that] are predicted to last several hundred years." (J.A. at 193.) OSM also emphasized that Fern Lake is the only "domestic water supply of the same quality. . . [that] it would be economically feasible for the city [of Middlesboro] to utilize." (*Id.* at 194.) This decision closely parallels the government action at issue in *Rith*, the denial of a permit under the SMCRA in order to prevent potentially contaminated runoff into a water supply. In *Rith* we described the government character of this action as an exercise of the "police power directed at protecting the safety, health, and welfare of the communities surrounding the . . . mine site by preventing harmful runoff [into local water supplies]." *Rith II*, 270 F.3d at 1352.[7] So too, OSM's

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[7] To the extent that Appolo argues that the motion in limine was improperly granted because it should have been allowed to challenge the LUM decision's health and safety findings, our case law teaches otherwise. *See, e.g., Rith II*, 270 F.3d at 1352 ("[I]n a takings case we assume that the underlying governmental action was lawful."); *M & J Coal*, 47 F.3d at 1154 ("It is incontestable that OSM's actions were legitimate exercises under SMCRA to prevent harm to the public health and safety . . . . [The plaintiff] had chosen not to challenge the validity of OSM's enforcement actions by way of a district court action . . . . Neither the Court of Federal Claims nor this court may entertain a collateral challenge to the validity of OSM's actions."); *Tabb Lakes*, 10 F.3d at 802-03 ("[C]laimant must concede the validity of the government action which is the basis of the taking claim to bring suit under the Tucker Act."); *Fla. Rock Indus.* v. *United States*, 791 F.2d 893, 905 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) ("We hold that the trial court committed an error of law in investigating and determining, notwithstanding the district engineer's finding that there was at least

LUM decision is "the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations." *Id.*

Based on our analysis of the *Penn Central* factors, we conclude that Appolo's lack of reasonable investment-backed expectations is coupled with government action designed to protect health and safety. As in *Rith*, we think that these factors taken together outweigh Appolo's economic injury, even if it was severe. *See id.* at 1352 (denying compensation despite the fact that "the regulatory action in this case caused a substantial diminution in the value of [the appellant's] coal leases"). Consequently, we affirm the rejection of Appolo's partial regulatory takings claim.

C

Appolo's final contention on appeal is that the Court of Federal Claims incorrectly denied its claim for a temporary taking. Appolo was prohibited from mining in the petition area during the pendency of the LUM petition because Appolo's application for a mining permit was held in abeyance during that period in accordance with 30 C.F.R. § 764.15. Appolo contends that OSM's eighteen-month delay in reaching a LUM decision (beyond the statutorily mandated one-year time frame) constituted a temporary taking of its mining rights in the petition area from February 15, 1995 (one year and one day after the filing of the LUM petition), to September 13, 1996 (the date OSM granted the petition).

Delay in the regulatory process cannot give rise to takings liability unless the delay is extraordinary. *Boise Cascade Corp.* v. *United States*, 296 F.3d 1339, 1352 (Fed. Cir. 2002)

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some *de jure* pollution to be anticipated from Florida Rock's project, in reality there was none. The apparent purpose was to sustain the assessment of taking liability for injury inflicted by a regulation, but the alleged taker had a right, in the Claims Court, to have the claim assessed on the basis that its regulatory action was valid and correct in all respects.").

("[A]bsent denial of a permit, only extraordinary delays in the permitting process ripen into a compensable taking."). If the delay is extraordinary, the question of temporary regulatory takings liability is to be determined using the *Penn Central* factors. *Id.* The eighteen-month delay here is far short of extraordinary. *See, e.g.*, *Tahoe-Sierra*, 535 U.S. at 306 (holding that a thirty-two month moratorium on development was not extraordinary delay); *Wyatt*, 271 F.3d at 1097-100 (finding that there was no extraordinary delay despite a nearly ten-year permitting process); *see also Tahoe-Sierra*, 535 U.S. at 346-47 (Rehnquist, C.J., dissenting) (concluding that delays of six years or more should be considered per se takings). Even if the delay were considered extraordinary, we have already determined that application of the *Penn Central* factors here does not support a finding that there was a permanent regulatory taking.

Where, as here, a permanent restriction does not constitute a compensable permanent regulatory taking, it would be strange to hold that a temporary restriction imposed pending the outcome of the regulatory decisionmaking process requires compensation. A temporary restriction is necessarily less burdensome to the property owner than a permanent restriction. In this case, Appolo offers no reason why the temporary restriction should be held to be a regulatory taking (when the permanent restriction is not) other than that the delay created uncertainty. The existence of uncertainty stemming from delay in the regulatory decisionmaking process and the consequent difficulty of business planning, at least in the circumstances here, cannot create liability for a temporary taking where application of the *Penn Central* factors mandates a conclusion that a permanent restriction does not create takings liability.

CONCLUSION

For the foregoing reasons, we affirm the Court of Federal Claims' grant of summary judgment in favor of the government.

AFFIRMED

COSTS

No costs.

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-1L

APPOLO FUELS, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Takings; Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (2002); regulatory taking; categorical taking; temporary taking; parcel as a whole.

FILED: December 18, 2002

OPINION

MILLER, Judge.

This takings case comes before the court after argument on defendant's motion for summary judgment. The Government prevented plaintiff from surface mining coal based on a citizens' petition that obtained federal protection for a reserve on which plaintiff planned to mine. Plaintiff, thwarted from pursuing its endeavor, sued, claiming a permanent, as well as a temporary, regulatory taking. Defendant also filed a motion *in limine* to prevent the landowner from challenging a determination that its mining activities contravened federal environmental law.

FACTS

The facts recited herein are undisputed, unless otherwise noted.

1. *The Surface Mining Control and Reclamation Act of 1977*

In 1977 Congress passed the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (2002) ("SMCRA" or the "Act"), in an effort to regulate the "expansion of coal mining to meet the Nation's energy needs" by establishing "appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public." 30 U.S.C. § 1201(d). The Act created the Office of Surface Mining Reclamation and Enforcement ("OSM") within the Department of the Interior and charged OSM with the implementation of SMCRA. *See* 30 U.S.C. § 1211(a), (c).

To comply with SMCRA, an organization must obtain a permit from the appropriate state regulatory authority before engaging in surface coal mining operations.[1] *See* 30 U.S.C.

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[1] In October 1984 OSM took over the administration of SMCRA in Tennessee, as the state program charged with implementing SMCRA had failed to maintain the program adequately. *See Rith Energy. Inc.* v. *United States*, 247 F.3d 1355, 1359 (Fed. Cir. 2001), *cert. denied*, 122 S. Ct. 2660 (2002).

§ 1256. An applicant, in order to receive a permit, must show that it can conduct its surface mining in accordance with SMCRA's criteria, which include several environmental requirements. SMCRA also allows, in accordance with section 1272(c), any "person having an interest which is or may be adversely affected to . . . petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations . . . ." Within ten months of the receipt of such a petition, OSM "shall hold a public hearing in the locality of the affected area . . . ." § 1272(c). OSM must release "a written decision regarding the petition, and the reasons therefore [sic]" within 60 days of the public hearing. *Id.*

Section 1272(a)(2) of the Act requires the state regulatory authority to "designate an area as unsuitable for all or certain types of surface coal mining operations if [it] determines that reclamation pursuant to the requirements of [the] Act is not technologically and economically feasible." Moreover, the Act prohibits surface mining, unless approved by the appropriate authorities, that will "adversely affect any publicly owned park or places included in the National Register of Historic Sites," or "within three hundred feet from any occupied dwelling, unless waived by the owner thereof, [or] within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery." §§ 1272(e)(3), (5). If an area previously has been designated as unsuitable for surface coal mining, an interested party may petition to have the designation terminated. *See* § 1272(c).

2. *Plaintiff's business operations*

Appolo Fuels, Inc. ("plaintiff"), is a Kentucky corporation engaged in the business of mining and selling coal. It was incorporated in 1972 by various members of the Asher family and was formed primarily to produce and sell coal from the area around Middlesboro, Kentucky. During the 1980's and into the mid-1990's, plaintiff obtained approximately one half of its coal supply from underground mines. Although plaintiff employs independent contractors for its surface, underground,

and auger mining operations, it conducts preparation and loading operations at its own facilities in Paramount, Kentucky. Once the coal is processed at the Paramount facility, it is sold through Diversified Energy, Inc., a corporation that is related to plaintiff

3. *The section 1272 petition*

In August 1989 plaintiff contracted with White Oak Coal Co., Inc. ("White Oak"), to purchase certain assets, including two coal leases, a tipple lease, and all existing mining permits attached to these leases, for $2,500,000.00. One of the leases plaintiff purchased had been granted by the J. M. Huber Corporation ("Huber"); this lease was dated April 1, 1986, and it covered approximately 2,600 acres in Bell County, Kentucky, and Claiborne County, Tennessee. On August 10, 1989, plaintiff and Huber negotiated a new lease ("Lease 5A"), which gave plaintiff strip and deep mining rights in certain coal seams,[2] including seams within the Little Yellow Creek watershed ("the Creek watershed"). The Creek watershed is located near plaintiff's Paramount facilities and spans across the Tennessee-Kentucky border. The Little Yellow Creek drains into Fern Lake, which serves as a water supply for the population of Middlesboro.

Plaintiff began mining under Lease 5A in 1989, and, on February 8, 1994, applied for a permit from OSM to mine 214 acres within the Tennessee portion of the Creek watershed.[3] On February 14, 1994, the City of Middlesboro and the National Parks Conservation Association filed a petition (the "section 1272 petition") with OSM seeking designation of approximately 50% of the Creek watershed, under 30 U.S.C. § 1272(c), as unsuitable for surface coal mining operations. The petitioners alleged that surface mining within the petition area would detrimentally affect the availability of water supplies; the local land use plans and programs, including the

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[2] Lease 5A was amended on October 23, 1990, to include auger mining rights.

[3] OSM assigned number 2943 to plaintiff's permit application.

Cumberland Gap National Historical Park; and the scientific and aesthetic value of the water and lands encompassing the Creek watershed. On March 15, 1994, the section 1272 petition was deemed complete, and OSM began its evaluation process. In order to comply with the requirements of SMCRA and the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C) (2002) ("NEPA"), OSM proceeded to prepare a combined petition evaluation document and environmental impact statement (the "PED/EIS").

On March 30, 1994, OSM notified plaintiff that its permit application was administratively complete.[4] However, OSM explained that, while it could engage in a technical review of the application, final processing of the application could not be completed until a decision was made on the section 1272 petition. Plaintiff indicated, on April 6, 1994, that OSM should begin its technical review of the permit application. On November 3, 1994, plaintiff received a technical deficiency letter from OSM, which requested additional information from plaintiff necessary to continue processing its application. Plaintiff did not respond to the deficiency letter, thereby halting OSM's technical review of its application.[5]

In the January 26, 1996 Federal Register, OSM announced the availability of the draft PED/EIS and requested public comments. A public hearing was held on the PED/EIS on March 12, 1996, and OSM accepted comments until July 1,

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[4] OSM reviews applications for mining permits in three stages: First, the agency determines if an application is administratively complete; second, the application undergoes a technical review to ensure that it satisfies all legal requirements; and, third, the application is closed out, and any final matters (such as securing bonds) are addressed. *See Wyatt* v. *United States*, 271 F.3d 1090, 1094 (Fed. Cir. 2001).

[5] Plaintiff claims that it did not respond to the November 3, 1994 letter because the information requested by OSM was beyond the scope of SMCRA. "OSM advised [plaintiff] by this letter that it expected [plaintiff] . . . to complete the [PED/]EIS." Pl.'s Br. filed Sept. 5, 2002, at 23.

1996. The final PED/EIS was issued in August 1996. On September 13, 1996, the Director of OSM issued his final decision on the section 1272 petition. The Director indicated that he considered the following factors in reaching his decision: 1) the draft and final PED/EIS, 2) the petitioners' allegations, 3) oral testimony from the public hearing, 4) written submissions received during the comment period, and 5) personal meetings with individuals and organizations directly impacted by the disposition of the section 1272 petition.

In the final decision on the section 1272 petition, issued on September 13, 1996, the Director ultimately decided to designate "the entire petition area as unsuitable for all surface coal mining operations but [to] allow underground mining from outside the petition area." The Statement of Reasons, also dated September 13, 1996, supporting the decision, offered several bases for the Director's decision, including: 1) the potential impact of mining on the survival of the blackside dace, an endangered species of fish present in the Creek watershed; 2) the damage that mining would cause to "important aesthetic values and natural systems" that conflict with the "goals of the master plan for the Cumberland Gap Historical Park;" and 3) the long-term effect that mining would have on Middleboro's water supply and quality. The Director emphasized that "the most important consideration [in granting the section 1272 petition] was the impact of surface coal mining operations in the petition area on [the] productivity of the Fern Lake water supply."

4. *Plaintiff's other coal mining interests*

On September 1, 1989, plaintiff obtained an additional lease from Huber ("Lease 7A") that granted deep mining rights both within and outside the section 1272 petition area. On December 21, 1992, plaintiff acquired, for $750,000.00, approximately 600 acres surrounding Fern Lake in fee simple, 367 of which fell within the section 1272 petition area. Although the property contained coal reserves, plaintiff apparently intended to use the property "as a buffer zone, so

that no housing or anything else could be developed there." Pl.'s Br. filed Sept. 5, 2002, at 46.

Plaintiff executed another lease for strip and auger mining rights from Huber ("Lease 14A") on February 1, 1995. Originally, Lease 14A did not include any lands within the section 1272 petition area, and consideration for the lease consisted of annual advance royalties and production royalties. However, Lease 14A was amended on or around April 20, 1995, to include approximately 229 acres within the petition area. This amendment indicated that the acreage granted under the amendment lay "within the watershed of the Little Yellow Creek and Fern Lake and that said watershed is under a [section 1272] Petition filed with the Office of Surface Mining to declare the watershed unsuitable for mining." Lease 14A was further amended on June 1, 1996, to include mining rights within an additional 2,013 acres covered by the section 1272 petition. This amendment contained the same language regarding the petition that appeared in the April 20, 1995 amendment.[6]

Subsequent to the execution of Lease 14A, plaintiff negotiated a series of additional leases from Huber, each conveying the right to mine various coal seams both within and outside the petition area. Consideration for these leases consisted of the same royalty arrangements negotiated for Lease 14A. Lease 15A, granting strip and auger mining rights, was executed on February 1, 1996. Leases 16A and 17A, acquired on June 1, 1996, gave plaintiff strip, auger, and deep mining rights. Plaintiff acquired Lease 18A on September 1, 1997.[7] Lease 18A originally granted plaintiff strip and auger

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[6] Although plaintiff acknowledges that both amendments to Lease 14A contained the same disclaimer, plaintiff counters that it had formed the expectation, years before the execution of the amendments, that it would be allowed to mine within the Creek watershed. *See* Pl.'s Br. filed Sept. 5, 2002, at 43-44.

[7] One of defendant's experts indicates that Lease 18A was executed on September 9, 1997. *See* Expert Report of Stagg Resource Consultants, Inc., Nov. 20, 2001, at 35. As shown *infra*

mining rights, but was amended to include deep mining rights. Finally, plaintiff acquired deep mining rights through Lease 19A on August 1, 2001.[8]

5. *Plaintiff's district court challenge to the section 1272 petition*

On November 12, 1996, plaintiff and Huber sued the Secretary of the Department of the Interior, under 30 U.S.C. § 1276,[9] in the U.S. District Court for the Eastern District of Tennessee. The suit alleged that the granting of the section 1272 petition was arbitrary, capricious, and inconsistent with the law. Plaintiff specifically noted that OSM had exceeded the 12-month period,[10] provided in 30 U.S.C. § 1272(c), for rendering a decision on a section 1272 petition. Plaintiff claimed that exceeding the statutory time limitation violated due process and that OSM proceedings on the section 1272 petition constituted an unwarranted exercise of the Government's police powers.

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section I(2)(1), this discrepancy is immaterial to the court's analysis, so the court will utilize the September 1, 1997 date for the purposes of assessing plaintiff's claims.

[8] Huber sold its surface and mining interests in the southeastern United States to BLC Properties, LLC ("BLC"), on July 5, 2001. All of the leases obtained by plaintiff from Huber, including the royalty interests attached thereto, are now held by BLC.

[9] 30 U.S.C. § 1276(a)(1) provides that any action "constituting rulemaking by the Secretary [of the Interior] shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law."

[10] Plaintiff arrived at the 12-month figure by totaling the two statutory deadlines in section 1272(c): 1) the requirement that OSM hold a public hearing within ten months of receiving the petition, and 2) the mandate that OSM issue a written opinion within 60 days of the hearing.

On July 16, 1998, plaintiff moved to dismiss the district court action, electing instead to pursue a takings claim in the Court of Federal Claims. The district court granted plaintiff's motion, and plaintiff filed its takings suit on January 3, 2000. Plaintiff alleges: 1) a permanent regulatory taking of its coal mining interests as a result of the section 1272 petition and 2) a temporary taking caused by OSM's delay in processing and granting the section 1272 petition. As to the permanent taking, plaintiff has alleged both a categorical taking and, alternatively, a "severe diminution in the value of [p]laintiff's property interests." Compl. filed Jan. 3, 2000, ¶ 20.

DISCUSSION

I. Defendant's motion for summary judgment

1. *Summary judgment standard for takings cases*

While a court should avoid "precipitous grants of summary judgment" in takings cases owing to the "fact-intensive" nature of such claims, *Yuba Goldfields. Inc.* v. *United States*, 723 F.2d 884, 887 (Fed. Cir. 1983), the fact that this is a "takings case does not affect the availability of summary judgment when appropriate to the circumstances." *Avenal* v. *United States*, 100 F.3d 933, 936 (Fed. Cir. 1996). Summary judgment is proper when no genuine issues of material fact are in dispute and the moving party is entitled to judgment as a matter of law. *See* RCFC 56(c).

2. *Regulatory taking*

Plaintiff asserts that the granting of the section 1272 petition effected a regulatory taking of certain of its property interests in the Creek watershed. It claims that the 1272 petition constitutes both a categorical regulatory taking and a partial regulatory taking described by plaintiff as a "severe diminution in the value of [p]laintiff's property interests." Compl. ¶ 20.

The Supreme Court first identified the possibility of a compensable regulatory taking in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). Justice Holmes, as paraphrased by Justice Scalia, recognized that "if the protection against

physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (citing *Mahon*, 260 U.S. at 414-15). While the pre-*Mahon* Court had limited its takings jurisprudence to instances of physical occupation or dispossession of private property for public uses, Justice Holmes opined that, if left constitutionally unchecked, the Government would be free, under the police power, to restrict private property uses without paying compensation. Therefore, the Court has "repeatedly and consistently endorsed Holmes' observation that 'if a regulation goes too far it will be recognized as a taking." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1480 (2002) (quoting *Mahon*, 260 U.S. at 415).

After *Mahon* the Court refused to subscribe to a rigid formula for determining when a regulation goes "too far," choosing instead to engage in "essentially ad hoc, factual inquiries," *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), designed to allow "careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra*, 122 S. Ct. at 1481 n.23 (quoting *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)). Nonetheless, the Court's takings jurisprudence eventually recognized two types of compensable regulatory takings: 1) categorical and 2) partial.

In the former line of cases, the Court's Lucas decision announced that if regulatory action destroyed all economically beneficial use of a certain parcel of property, the trial court did not need to engage in the multi-pronged analysis that characterizes a partial regulatory takings claim. *See* 505 U.S. at 1027. The *Lucas* court concluded that a state environmental statute, passed after plaintiff purchased two beachfront lots, may have effected a categorical taking by preventing the residential development of the lots and remanded the case to the South Carolina Supreme Court for final determination. In

subsequent regulatory takings cases, the Court has clarified that *Lucas*'s holding "was limited to 'the extraordinary circumstance when no productive or economically beneficial use of land is permitted." *Tahoe-Sierra*, 122 S. Ct. at 1483 (quoting *Lucas*, 505 U.S. at 1017). The Federal Circuit has echoed this formulation, concluding that a categorical taking is effected when "all economically viable use, *i.e.*, all economic value, has been taken by the regulatory imposition." *Palm Beach Isles Assocs.* v. *United States*, 231 F.3d 1354, 1357 (Fed. Cir.), *modifying* 208 F.3d 1374 (Fed. Cir. 2000).

If a regulation does not render the subject property essentially valueless, a landowner still may merit compensation if it has suffered a partial regulatory taking. A partial regulatory taking "is the consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner . . . ." *Palm Beach Isles*, 231 F.3d at 1357. Although continuing to reject a set formula for determining when application of a government regulation produces a partial regulatory taking, the Court has recently reaffirmed its adherence to certain key factors first espoused in *Penn Central*. *See Palazzolo*, 533 U.S. at 633 (O'Connor, Jr., [sic] concurring) ("Our polestar remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings."). The *Penn Central* Court indicated that 1) the extent to which the regulation interfered with the claimant's investment-backed expectations, 2) the character of the government action, and 3) the economic impact of the regulation on the claimant[11] have "particular significance"

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[11] Although the Court has refused to establish a bright line figure to denote when the economic impact on the claimant becomes severe enough to warrant a compensable taking, a "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe and Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 645 (1993). In the case at bar, plaintiff claims that its property suffered a "severe" diminution in value. Compl. ¶ 20.

when determining if a regulation has engendered a partial regulatory taking. 438 U.S. at 124.

1) *Relevant parcel*

In order to evaluate plaintiff's takings claims, the court must, as a threshold matter, determine the specific parcel that plaintiff alleges has been taken, an inquiry that aptly has been characterized as the "difficult, persistent question of what is the proper denominator in the takings fraction." *Palazzolo*, 533 U.S. at 631. Because the test for a regulatory taking requires a comparison of "the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987) (internal quotation marks omitted).

The Supreme Court consistently has refused to prescribe a rigid formula for determining the appropriate parcel in regulatory takings cases, instead instructing courts to focus on " 'the parcel as a whole.' " *Tahoe-Sierra*, 122 S. Ct. at 1481 (2002) (quoting *Penn Central*, 438 U.S. at 130-31). While the Court never has issued a firm definition of what constitutes the appropriate parcel as a whole, *see Lucas*, 505 U.S. at 1016 n.7, it has counseled against labeling the property subject to the regulation as the appropriate parcel, noting that "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question; however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe and Prods. of Cal,. Inc.* v. *Constr. Laborers' Pension Trust for So. Cal.*, 508 U.S. 602, 644 (1993); *see also Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 802 (Fed. Cir. 1993). Therefore, it is important not to "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," *Penn Central*, 438 U.S. at 130, because "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979).

Defendant argues that the appropriate "parcel as a whole" should include "all of [p]laintiff's coal interests in the petition area and surrounding areas controlled by lease or fee ownership as of the date of the alleged taking on September 13, 1996."[12] Def.'s Br. filed May 20, 2002, at 34. This parcel would include all of the mining rights granted under Leases 5A, 7A, 14A, 15A, 16A, 17A, 18A, and 19A, as well as "a number of other leases and some fee or surface owned properties." *Id.*[13] Defendant justifies this expansive parcel by claiming that all of the included "properties were . . . acquired for use in [p]laintiff's coal mining operations," *id.*[14] and cites in support the Federal Circuit's rulings in *Tabb Lakes; Forest Props., Inc.* v. *United States*, 177 F.3d 1360 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 951 (1999); and *Waleck* v. *United States*, 303 F.3d 1349 (Fed. Cir. 2002).

Plaintiff counters that "the appropriate parcel for analysis here consists of the surface mineable coal reserves held by [plaintiff] within the [Creek] watershed." Pl.'s Br. filed Sept. 5, 2002, at 22.[15] While plaintiff concedes that, when

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[12] September 13, 1996, is the date on which the Director of OSM issued his decision on the section 1272 petition.

[13] These additional leases and fee properties include mining rights within Kentucky and were granted or acquired between 1971 and 1997. *See* Decl. of Alan K. Stagg, May 13, 2002, Attach. 1.

[14] Plaintiff has withdrawn its takings claims as to any coal reserves located within the state of Kentucky, so those reserves are not considered in the court's decision. *See* Pl.'s Br. filed Sept. 5, 2002, at 49-50.

[15] Plaintiff requested that its expert, Weir International Mining Consultants ("Weir"), study the coal reserves allegedly sterilized by virtue of the section 1272 petition. Weir included in its study the reserves within the Creek watershed granted by Leases 5A, 14A, 15A, 16A, and 18A, because it believed that the reserves within the watershed constitute a "logical mining unit." Pl.'s Br. filed Sept. 5, 2002, at 19-20. However, plaintiff instructed Weir to refrain from formulating estimates as to the value of these reserves both before and after the section 1272 petition, as it claims that "only the strip reserves within the petition area constitute the appropriate

determining the relevant parcel, the Supreme Court has prohibited the severance of a parcel into distinct interests, it argues that severance is not an issue in this case because plaintiff's "property right consists of coal leases which convey to [plaintiff] but a single strand in the bundle of rights, [*i.e.*,] the right to extract a particular mineral, coal." *Id.* at 23. Plaintiff supports this view by invoking three Federal Circuit cases: *Florida Rock Indus., Inc.* v. *United States*, 791 F.2d 893 (Fed. Cir. 1986); *Whitney Benefits, Inc.* v. *United States*, 18 Cl. Ct. 394, 399 (1989), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991); and *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994).

Defendant's principal case, *Tabb Lakes*, involved plaintiff's attempts to develop an 167-acre parcel of land into a residential subdivision. Plaintiff divided the property into five sections and constructed and sold houses on sections 1 and 2 over a two-year period. Because sections 3, 4, and 5 allegedly contained wetlands, the U.S. Army Corps of Engineers (the "Corps") informed plaintiff that it was required to obtain a permit to comply with the Clean Water Act (the "CWA"). Plaintiff challenged the Corps' assertion of jurisdiction in district court and prevailed in that action. Plaintiff then filed an action in the Court of Federal Claims alleging a temporary taking of its property.

On appeal the Federal Circuit noted that "the quantum of land to be considered is not each *individual* lot containing wetlands or even the combined area of wetlands." 10 F.3d at 802. However, the court ultimately did not determine whether the appropriate parcel was the entire 167 acres, or only sections 3, 4, and 5 of the development. It concluded that "this dispute need not be resolved" because "the permit system brings the facts of this case within the ambit of the holdings that preliminary regulatory activity does not effect a taking in the constitutional sense." *Id.*

'denominator.' " *Id.* at 20. Thus, despite the conclusions of its expert, it appears that plaintiff's proposed denominator excludes any coal reserves outside the petition area.

Defendant also puts forth *Forest Properties* as support for designating all of plaintiff's coal holdings, both within and without the Creek watershed, as the appropriate denominator in this case. In *Forest Properties* Big Bear Properties, Inc. ("Big Bear"), planned to develop for residential use a parcel of land consisting of 53 acres of lake-front property and roughly 9.4 acres of lake-bottom land contiguous to the lake-front acres. The 9.4 acres were wetlands, so Big Bear applied to the Corps for a permit to dredge and fill approximately nine acres of the wetlands. While the permit was pending, Big Bear sold a portion of the 62-acre parcel to plaintiff, and assigned the remainder without demanding additional compensation. When the Corps refused to issue a permit to develop even a portion of the total acreage, plaintiff sued for a regulatory taking in the Court of Federal Claims. After finding that the property as a whole remained profitable despite the permit denial, the trial court concluded that no compensable taking had occurred.

The Federal Circuit agreed that the "relevant parcel for takings analysis is the entire 62 acre project." 177 F.3d at 1365. Noting that precedent required the court take a flexible, fact-based approach to the parcel delineation, the court stated that this approach "requires courts to focus on the economic expectations of the claimant with regard to the property." *Id.* Because plaintiff acquired the 62 acres with the expectation of developing them as a single project, the trial court was correct in rejecting plaintiff's contention that the 9.4 acres of lake-bottom property should he the relevant parcel. "In holding that the entire 62 acre project was the relevant parcel . . . the Court of Federal Claims properly looked to the economic reality of the arrangements, which transcended . . . legalistic bright lines . . . ." *Id.* at 1366.

Finally, in a recent decision, the Federal Circuit reaffirmed its adherence to 'the "parcel as a whole" rule, upholding the trial court's determination that the relevant parcel was the entire tract of land owned by plaintiffs. *Waleck*, 303 F.3d at 1356. Plaintiffs in *Waleck* owned 14.5 acres of property on a Delaware beach, 13.2 of which were subject to the CWA.

After the Corps denied plaintiffs a permit to develop their property for residential use, they filed a takings claim. While that action was pending, the Corps issued plaintiffs a permit allowing development on 2.2 of the 13.2 acres of wetlands, but requiring that plaintiffs create or restore 4.4 acres of additional wetlands.

The *Waleck* plaintiffs advocated at trial that the relevant parcel should be the 13.2 acres of wetlands subject to federal regulation. After the trial court rejected plaintiffs' categorical and partial regulatory takings claims, plaintiffs appealed to the Federal Circuit. There, plaintiffs argued that the relevant parcel should be the 11 acres of wetlands that the Corps protected from development and that the Supreme Court's decision in *Palazzolo*, which did not include an analysis under the *Penn Central* factors, somehow evinced a departure from the parcel-as-a-whole approach in takings cases. Rejecting both of plaintiff's arguments, the Federal Circuit upheld the trial court's determination that the entire 14.5-acre parcel served as the appropriate denominator. Citing the *Tabb Lakes* decision with approval, the Federal Circuit noted that *Tahoe-Sierra* "recently reaffirmed that in regulatory takings analysis, the relevant parcel is the parcel as a whole." 303 F.3d at 1356.

The controlling case law instructs the trial court to look beyond the regulated portion of the property in determining the appropriate parcel as a whole. In each of the three cases relied on by plaintiff, the court designated only the portion of land subject to the regulatory activity as the relevant parcel. What distinguishes these cases, however, is that their factual genesis is wholly dissimilar to the case at bar.

Plaintiff in *Florida Rock* applied for a mining permit from the Corps in order to extract limestone from a 98-acre area. The Corps denied the permit, and plaintiff filed a takings suit. Although the 98-acre tract was part of a 1,560-acre parcel owned by plaintiff, the Federal Circuit upheld the designation of the 98 acres subject to the permit as the relevant parcel.

The Federal Circuit predicated its choice of denominator on the fact that plaintiff was precluded from mining on any portion of the 1,560 acres because, at that location, it was "and, for the immediate future, remain[ed] illegal to mine without a permit in the only fashion [plaintiff] consider[ed] feasible." 791 F.2d at 904. In this case plaintiff retains several leasehold and fee interests outside the section 1272 petition area and is fully entitled to mine these areas. The section 1272 designation prohibits only surface mining in the Creek watershed and expressly allows underground mining from outside the petition area. Moreover, the various Huber leases grant surface, deep, and auger mining rights in areas both within and outside the Creek watershed. Therefore, unlike the scenario in *Florida Rock*, plaintiff is able to mine in areas not affected by the Government's regulatory activity.

Plaintiffs in *Whitney Benefits*, having purchased a lease for coal mining rights to certain lands, applied for a permit from Wyoming state authorities to perform surface strip mining. Plaintiffs withdrew the request for procedural reasons, and, before they could refile, SMCRA became law. While negotiating with federal authorities to take advantage of SMCRA's exchange provision,[16] plaintiffs filed a takings claim. Plaintiffs had intended to mine the entirety of their coal estate using surface methods, and the trial court concluded that any permit application to mine in that fashion would run afoul of SMCRA's prohibitions. As for other mining methods, the trial court noted that "little evidence [was presented] to refute plaintiffs' contention that underground mining of Whitney coal is economically and technologically unfeasible." 18 Ct. Cl. at 405. Thus, the trial court concluded that SMCRA had effected a taking of plaintiffs' property.

The Federal Circuit affirmed, stating that the "only property here involved is the right to surface mine a particular deposit

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[16] Section 1260(b) of SMCRA allows claimants who made substantial legal and financial commitments to coal property before the passage of SMCRA to exchange that property for federal coal holdings. *See Whitney Benefits*, 18 Cl. Ct. at 397-98.

of coal." 926 F.2d at 1172. Thus, *Whitney Benefits* stands in stark contrast to the situation faced by plaintiff in the present case. Plaintiff previously has taken (and can now and in the future take) advantage of its surface, auger, and deep mining rights outside the petition area and is prohibited only from engaging in surface mining within the petition area. Plaintiff cannot analogize its situation to that of landowners that faced effective abrogation of all of their coal mining interests by SMCRA's passage.

The third case cited by plaintiff also does not provide support for its choice of denominator. Plaintiff in *Loveladies* owned a 250-acre parcel of land, including 11.5 acres of wetlands and one acre of filled land. Plaintiff had developed 199 acres before the passage of the CWA and applied for a permit from the appropriate New Jersey authorities and the Corps to fill 50 acres in order to cultivate the undeveloped 51-acre area for residential use. Plaintiff eventually obtained permission from state authorities to develop only 12.5 acres of the unimproved land, leaving the remaining 38.5 acres "for all practical purposes . . . promised to New Jersey." 28 F.3d at 1181. However, plaintiff was denied a federal permit for any portion of the undeveloped 51 acres. After unsuccessfully challenging the federal permit denial in district court, plaintiff filed a takings claim. The trial court excluded all acreage developed before the taking occurred, as well as acreage claimed by the state.

In reviewing the "denominator problem," the Federal Circuit noted that, as part of the "factual nuances" informing the parcel determination, the court should "include consideration of the timing of transfers in light of the developing regulatory environment." 28 F.3d at 1181. Because the Government established its regulatory framework after 199 acres of plaintiff's land had been developed, the trial court was correct in excluding that acreage from the denominator. Moreover, after the State of New Jersey forced plaintiff to leave 38.5 acres of the remaining 51 acres undeveloped, "whatever substantial value that land had now belongs to the state and not to [plaintiff]." *Id.* Thus, the

relevant denominator properly excluded that acreage. Consequently, the relevant parcel consisted of the 12.5 acres covered by the New Jersey permit.

The relevant parcel in *Loveladies* coincided with the area covered by the permit only because the remainder of plaintiff's property was either developed before the imposition of the federal regulatory scheme or was required by the state to remain undeveloped wetlands. In the case at bar, plaintiff acquired Lease 5A in 1986 and obtained a series of leases from Huber during the next ten-plus years. SMCRA, the regulation which occasioned the alleged taking, was passed by Congress in 1977. Therefore, the court is not presented with a situation in which plaintiff's expectations as to the development of the property were formed before the imposition of a regulatory framework.[17] Moreover, neither the state of Tennessee nor the federal government has barred plaintiff from mining in the portions of the leases outside the petition area.

A fair distillation of the applicable case law requires the court to adhere to the factual inquiry warranted by the parcel-as-a-whole rule and to avoid any formalistic distinctions with respect to the property itself. *Forest Properties*, 177 F.3d at 1365-66; *see also District Intown Props. Ltd. P'ship* v. *District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999) (noting that "a court must also consider [when determining the correct parcel] how both the property owner and the government treat (and have treated) the property"). Courts have been willing to designate the area subject to government regulation as the appropriate denominator if the area contains the whole of a claimant's viable economic interests. *Florida Rock*, 791 F.2d at 904; *Loveladies*, 28 F.3d at 1181; *Whitney Benefits*, 926 F.2d at

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[17] The Supreme Court recently affirmed that a takings analysis must consider "the role [of] the temporal relationship between regulatory enactment and title acquisition . . . ." *Palazzolo*, 533 U.S. at 632 (O'Connor, J., concurring) (cited with approval in *Tahoe-Sierra*, 122 S. Ct. at 1486).

1172. In evaluating a regulatory takings claim, the court properly can consider the timing of property acquisition *vis-à-vis* the imposition of the regulatory scheme. *Loveladies*, 28 F.3d at 1181.

When viewed against these parameters, plaintiff's proposed denominator—the coal reserves only within the petition area—proves unsupportable. Plaintiff's formulation ignores its leasehold interests outside the petition area and outside the Creek watershed. Although it is proper to consider plaintiff's economic expectations with regard to the property, *see Forest Properties*, 177 F.3d at 1365, plaintiff has presented no evidence that it considered the petition area a distinct entity apart from its other leasehold interests. Indeed, plaintiff manifests that the company pursued the Huber leases in order "to ultimately exploit all of the surface mine reserves in the Fern Lake basin." Pl.'s Br. filed Sept. 5, 2002, at 8. Tellingly, plaintiff's own expert concluded that the coal reserves within the Creek watershed constituted a logical mining unit. *See supra* note 15. Plaintiff consequently cannot claim that the petition area was viewed as an economic entity separate from its coal holdings in the vicinity.

Plaintiff's argument to label the reserves in the petition area as the relevant parcel ignores Supreme Court precedent on the issue. The Court repeatedly has counseled against labeling the regulated property as the appropriate parcel because such a delineation, in practical application, would necessitate a finding of a compensable regulatory taking. *See Tahoe-Sierra*, 122 S. Ct. at 1483 ("[D]efining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, . . . the moratorium and the normal permit process alike would constitute categorical takings."); *Concrete Pipe*, 508 U.S. at 644 ("To the extent that any portion of property is taken, that portion is always taken in its entirety."). The Court has also made clear that plaintiff may not sever a portion of its property interest in order to claim complete abrogation of its rights in the severed portion. *See Penn Central*, 438 U.S. at 130. Although plaintiff denies that

it is engaged in this practice, it has put forth no evidence to support this disclaimer.

Turning to defendant's proposed parcel, the court equally is unconvinced by its choice of denominator. Defendant exhorts that all of the mining rights granted under Leases 5A, 7A, 14A, 15A, 16A, 17A, 18A, and 19A, as well as those contained in plaintiff's other, unspecified land holdings, should constitute the relevant denominator. *See* Def's Br. filed May 20, 2002, at 34. Plaintiff purchased Leases 5A and 7A in 1989 and acquired approximately 600 acres in fee surrounding Fern Lake on December 21, 1992. Plaintiff executed Lease 14A on February 1, 1995, and obtained two amendments, dated April 20, 1995, and June 1, 1996, to that lease which granted mining rights to land covered by the section 1272 petition. Lease 15A was executed on February 1, 1996, and plaintiff acquired Leases 16A and 17A on June 1, 1996. Finally, plaintiff executed Lease 18A on September 1, 1997, and Lease 19A on August 1, 2001.

The section 1272 petition was filed on February 14, 1994, and the Director of OSM granted the petition on September 13, 1996. Both parties acknowledge that any alleged taking commenced on September 13, 1996. This date comports with precedent dictating that a takings claim begins when a regulatory body makes a final decision to prevent the property owner from exploiting his or her property in a certain way. *See Waleck*, 303 F.3d at 1353 (regulatory takings claim began on date of Corps' final decision on permit application). Thus, logic would dictate that, if the alleged taking commenced on the date the petition was granted, mining interests acquired after that date should be excluded from the takings denominator. *See* Def.'s Br. filed May 20, 2002, at 34 (arguing that appropriate denominator includes "all of Plaintiff's coal interests . . . as of the date of the alleged taking on September 13, 1996"). As a consequence Leases 18A and

19A should be excluded from the relevant parcel, because plaintiff obtained them after the alleged taking commenced.[18]

The same approach necessitates the inclusion of Lease 5A in the relevant parcel. Lease 5A was executed in 1989 and contains coal interests both within and outside the Creek watershed. Plaintiff's plan to mine under Lease 5A prompted plaintiff to apply for the permit that precipitated the section 1272 petition. Moreover, it is apparent that plaintiff viewed the acquisition of Lease 5A as the initial phase in its plan to mine within the Creek watershed. Because plaintiff explained that it "typically planned its operation five years in advance," Pl.'s Br. filed Sept. 5, 2002, at 6, plaintiff knew by the late 1980's that it would need a replacement for the mine reserve held in Red Springs, west of Middlesboro, as that reserve, was projected to be exhausted by the mid-1990's. When plaintiff's president, in the late 1980's, became aware that coal reserves were available within the Creek watershed, he began acquiring leases in that area. Therefore, because the court must consider plaintiff's overall business plan for the

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[18] Defendant advocates including Lease 18A, which it admits that, owing to the date it was executed, "would normally not be included" in the takings denominator. Def.'s Br. filed May 20, 2002, at 34 n.23. Defendant's rationale is that plaintiff "was the most logical lessee." *Id.* It also argues that Lease 19A should constitute a portion of the denominator because "it is part of old Lease 17A, which was too expensive [for plaintiff] to maintain." *Id.* Defendant cites the deposition of Salvador A. Gaudiano, Jr., plaintiff's treasurer, in support of this argument. However, Mr. Gaudiano, when asked about the similarities between the 17A and 19A leases, stated that "the 17A [lease] incorporated about 35 million tons of coal. [Lease 19A] doesn't. [19A] is just one portion of [17A]." Dep. of Salvador A. Gaudiano, Jr., Oct. 30, 2001, at 64. Defendant has cited no case law to support the inclusion of leases executed after the date of the alleged taking, and Mr. Gaudiano's statements do not establish that Lease 19A is Lease 17A by another name. In these circumstances defendant's speculative evidence does not warrant inclusion of Leases 18A and 19A in the denominator.

land at issue, the inclusion of Lease 5A in the denominator is proper.

Plaintiff acquired approximately 600 acres in fee in 1992 with the intention that the property be used "as a buffer zone, so that no housing or anything else could be developed there." Def.'s Br. filed May 20, 2002, at 13. Although plaintiff apparently did not intend to mine the property, plaintiff's expert, Weir International Mining Consultants ("Weir"), examined coal reserves in plaintiff's fee properties when assessing the section 1272 petition's impact on plaintiff's coal holdings. *See* "Geologic and Reserve Study: Appolo Fuels, Inc. Property, Fern Lake Petition Area," Vol. I, Aug. 2001, Table 2A (the "Weir Study"). Even if the property was acquired only to protect plaintiff's mining operations from unwanted development, plaintiff treated the property as part of its overall mining plan for the area around the Creek watershed. *See Forest Properties*, 177 F.3d at 1366 (holding that when determining relevant parcel, trial court "properly looked to the economic reality of the arrangement"). Thus, this acreage shall be included in the parcel as a whole.

Although plaintiff obtained Lease 7A in 1989, well before it embarked on the permitting process, both plaintiff's and defendant's experts agree that the lease provided plaintiff with no reserves with any economic value. Lease 7A granted deep mining rights in two coal beds located in Kentucky and Tennessee. However, these coal reserves were not included in Weir's assessment of the property allegedly taken, as Weir concluded that "none of the deep mining reserves within the watershed were economic as of September 13, 1996," the day the Director of OSM granted the section 1272 petition. Pl.'s Response to Def.'s Proposed Finding of Fact No. 48, filed Sept. 5, 2002. Stagg Resource Consultants, Inc., ("Stagg"), tasked by defendant with assessing the reserve potential of the relevant coal bearing properties, arrived at the same conclusion. When assessing plaintiff's underground reserve potential, Stagg noted that underground mines had been established on the beds included in Lease 7A, but that neither bed "proved to be economic." Expert Report of Stagg, Nov.

20, 2001, at 43. Accordingly, Stagg formed the opinion that no reserves with any value existed on Lease 7A.

Therefore, Lease 7A should not constitute a portion of the parcel as a whole, because the section 1272 petition did not impact plaintiff's ability to mine under that lease. By the date the section 1272 petition was granted, no economically viable coal reserves existed on Lease 7A. Thus, plaintiff cannot claim that the section 1272 petition "took" any of the value of that lease, as the only rights the lease contained—deep mining rights—had provided no economic benefit to plaintiff. The inclusion of an already valueless lease would not help or hinder either party, as the 7A coal reserves would not bear on the extent to which the section 1272 petition impacted the economic value of the relevant parcel. Accordingly, the court excludes Lease 7A from the parcel as a whole.

The remainder of plaintiff's leaseholds, acquired before 1996, presents closer questions. Leases 14A, 15A, 16A, and 17A were all obtained between the filing and the grant of the section 1272 petition. When executed on February 1, 1995, Lease 14A originally did not contain any land covered by the section 1272 petition; however, in two subsequent amendments, plaintiff did obtain the right to mine in areas affected by the disposition of the petition. These amendments were obtained more than a year after the filing of the section 1272 petition and contained explicit language indicating that the land at issue was subject to the petition. Plaintiff explains that it "acquired the 14A [l]ease on the expectation of a favorable decision [on the petition] rendered in a timely manner, yet the deadline for the decision was repeatedly moved back." Pl.'s Br. filed Sept. 5, 2002, at 13. Nevertheless, plaintiff was fully aware of the pending petition, and the possibility that it would be granted, when it obtained the amendments to Lease 14A. It was aware of this same possibility when it executed Leases 15A, 16A, and 17A in the months previous to the OSM Director's decision.[19]

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[19] Plaintiff contacted OSM in late 1994 to inquire as to the status of the section 1272 petition and sent repeated requests regarding the

It also is apparent that plaintiff viewed Leases 14A, 15A, 16A and 17A as part of its plan to mine within the Creek watershed. Because plaintiff acquired these leases before the OSM Director's decision, and because plaintiff held the opinion that the section 1272 petition would be denied, plaintiff viewed these leases as part of its overall plan to mine in the Creek watershed. Thus, as it is proper for the court to consider plaintiff's overall business plan for the land at issue, the denominator must include Leases 14A, 15A, 16A, and 17A.

The court finds, considering both the timing of the Director's decision on the section 1272 petition and the economic realities of plaintiff's coal acquisition plan, the relevant parcel includes the coal reserves granted by Leases 5A, 14A, 15A, 16A, and 17A, as well as the reserves contained in the 600 fee acres acquired by plaintiff in 1992.

2) *Categorical taking*

Plaintiff alleges that the granting of the section 1272 petition effected a categorical regulatory taking of its property. In *Lucas* the Supreme Court determined that a state regulatory scheme passed after plaintiff purchased two beachfront lots could effect a categorical taking of plaintiff's property. *See* 505 U.S. at 1031. The regulatory scheme at issue prohibited plaintiff from constructing homes on the lots, and the trial court found that the prohibition had rendered the lots valueless. Because the regulation destroyed all economically beneficial use [of] the land, plaintiff argued, and the Supreme Court agreed, that plaintiff could demand compensation without attacking the validity of the regulation itself. In order for the state to avoid compensating plaintiff for a taking, it would be required to show that the use prohibited by the regulation "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place on land ownership." *Id.* at 1029. Because the trial court

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petition throughout 1995 and 1996. *See* Pl.'s Br. filed Sept. 5, 2002, at 13-14.

had not considered this "nuisance defense" to compensation, the Supreme Court remanded the case.

Subsequent to its decision in *Lucas*, the Supreme Court and the Federal Circuit delineated that categorical takings effected by regulations occur only when the regulation at issue leaves the property economically idle or prohibits all viable economically beneficial use of the land. *See Tahoe-Sierra*, 122 5. Ct. at 1483; *Palazzolo*, 533 U.S. at 617; *Palm Beach Isles*, 231 F.3d at 1357. The Federal Circuit also affirmed that a categorical takings analysis, unlike a partial regulatory takings analysis, does not necessitate an inquiry into whether the plaintiff had reasonable investment-backed expectations that were defeated by the regulatory measure. *Palm Beach Isles*, 231 F.3d at 1364. Thus, the court need not consider plaintiff's expectations regarding its mining properties when determining whether a categorical taking has occurred.

Defendant, seizing upon the nuisance defense articulated in *Lucas*, argues that plaintiff's claim should be denied "because, in granting the [section 1272 petition], OSM did no more than prohibit a use that is tantamount to a nuisance under Tennessee law." Def.'s Br. filed May 20, 2002, at 36. Defendant argues that Tennessee common law treats water pollution as a nuisance and that water pollution constitutes a nuisance *per se* under the Tennessee Water Quality Control Act of 1977 (the "TWQCA").

Plaintiff rejoins that *Lucas* requires defendant to proffer more than the section 1272 decision in making its nuisance claim. Defendant must "put forward proof which would be the equivalent of that necessary to sustain an injunction in state court on the issue." Pl.'s Br. filed Sept. 5, 2002, at 31. Further, plaintiff queries whether the TWQCA constitutes "one of the 'background principles' of state law which inform the nuisance exception," *id.* at 33-34, and whether defendant has shown that plaintiff's mining plan would violate the TWQCA's provisions. Finally, plaintiff contends that it satisfied the TWQCA's requirements when it successfully negotiated "an arduous technical review process" with the

Tennessee Department of Environment and Conservation ("TDEC"). *Id.* at 35.[20]

In focusing on the nuisance issue, the parties ignore the import of the Federal Circuit's decision in *Rith III*. *See Rith Energy, Inc.* v. *United States*, 44 Fed. Cl. 108 ("*Rith I*"), *recons. denied*, 44 Fed. Cl. 370 (1999) ("*Rith II*"), *aff'd on other grounds*, 247 F.3d 1355 (Fed. Cir.) ("*Rith III*"), *reh'g denied*, 270 F.3d 1347 (Fed. Cir. 2001) ("*Rith IV*"). That case involved the revocation of a coal mining permit previously granted to plaintiff by OSM in Tennessee. Having acquired leases after the enactment of SMCRA, which granted mining rights to 250 acres in Tennessee, plaintiff applied for, and initially received, a mining permit from OSM for an 89-acre portion of its holdings. However, OSM subsequently determined that plaintiff's mining activities posed "a threat to the hydrological balance outside the permit area." *Rith III* at 1360. Specifically, OSM concluded that the potential for acid mine drainage posed a greater danger to the environment than first perceived. Under the authority vested in it by SMCRA, OSM suspended plaintiff's permit, but allowed plaintiff to mine on a small portion of the regulated property, until plaintiff could devise a plan to minimize the mining's effect on the surrounding ecosystem. When plaintiff was unable to formulate a plan that satisfied OSM's parameters, it refused to issue a permit to resume mining in the disputed area.

After exhausting challenges to the permit denial through administrative and judicial channels, plaintiff filed suit,

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[20] According to plaintiff, it applied for an Aquatic Resource Alteration Permit ("ARAP") from TDEC in February, 1993. TDEC is charged with administering the TWQCA and subjected plaintiff's application to a "lengthy technical review process." Pl.'s Br. filed Sept. 5, 2002, at 9. Although it is not clear if plaintiff obtained an ARAP from TDEC, plaintiff proffers that the agency "stood ready to issue [plaintiff] its ARAP water quality permit" as of January 21, 1994. *Id.* at 10. Defendant disputes that plaintiff's argument regarding the ARAP permit process is supported by the record. *See* Def.'s Br. filed Oct. 16, 2002, at 20 n.17.

claiming that the permit denial constituted a compensable taking. Pointing to the TWQCA, the trial court found that OSM's permit denial, based on the potential for acid mine drainage, represented an "exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject under Tennessee nuisance law." *Rith I* at 115. On this basis the *Lucas* nuisance defense was deemed satisfied, and the court concluded that no compensable taking had occurred.

The Federal Circuit, although affirming the finding of no compensable taking, concluded that it did "need not reach the question whether [plaintiff's] mining activities would have been prohibited by Tennessee nuisance law." *Rith III* at 1362. The court noted that, when "measuring the regulatory burden on [plaintiff's] mining activities, it is appropriate to look at the extent to which [plaintiff] was able to exploit its leases throughout the permitting period." *Id.* Plaintiff could not focus only on the period following the permit revocation and then claim that it suffered a categorical regulatory taking, because such parsing would violate the Supreme Court's parcel-as-a-whole analysis. *Id.* at 1363. Finally, the court noted that, when assessing whether a taking is categorical, "the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." *Id.* (citing *Florida Rock*, 791 F.2d at 905); *accord Forest Properties*, 177 F.3d at 1367 (finding that increase in value of property after imposition of regulatory scheme undermined plaintiff's takings claim).

The court then concluded that plaintiff did not suffer a categorical taking, as it was able to extract coal before the suspension of the permit and continued to mine, with OSM's permission, on a portion of the property subject to regulation. Although plaintiff had expected to extract 250,000 tons of coal from the permit area and 380,000 tons from the entirety of its leased holdings, it still was able to extract 35,700 tons of coal before ceasing its mining operations. Moreover, the 35,700 tons were valued at $500,000.00; because plaintiff had paid only $33,500.00 for the leases, it was able to recoup its

investment in spite of the permit denial. Thus, even though plaintiff was able to harvest only 9% of its mining estimates, this percentage did not constitute the "'total wipe-out'" necessary for a categorical taking. *Rith III* at 1363 (quoting *Palm Beach Isles*, 208 F.3d at 1380).

Rith III requires an analysis of plaintiff's mining activities in the parcel as a whole in order to determine whether a categorical taking has occurred. As an initial matter, it is beyond dispute that the OSM Director's decision on the section 1272 petition prohibited only one type of mining (surface) on one portion of the parcel as a whole (the petition area). The section 1272 decision allowed underground mining from outside the petition area to continue. It allowed mining of all types to continue on the portions of Leases 5A, 14A, 15A, 16A, and 17A that fell outside the petition area. Plaintiff's own figures showcase that it has not suffered a categorical taking. Although plaintiff readily admits that Weir has not valued separately coal reserves inside versus outside the petition area, it claims that Weir estimated that 2,313,000 tons of mineable strip coal lie within the Creek watershed on the 5A Lease. *See* Pl.'s Br. filed Sept. 5, 2002, at 49. Plaintiff's former chief engineer, Eugene S. Boston, estimates that roughly 500,000 tons of strip coal lie outside the watershed. *See* Decl. of Eugene S. Boston, Aug. 27, 2002, ¶ 2.

Thus, plaintiff calculates that 78% of the tonnage on Lease 5A has been lost owing to the section 1272 petition. Even assuming, *arguendo*, that the section 1272 petition rendered plaintiff unable to mine in the watershed,[21] the *Rith IV* court held that an 91% reduction in the amount of mineable coal did not constitute a categorical taking. *See Rith IV* at 1349. Using the same methodology, plaintiff also claims that the section 1272 decision rendered 92% of the strip reserves on

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[21] Plaintiff makes repeated references to coal reserves "sterilized" by the section 1272 petition, and Weir estimates that the amount of saleable coal allegedly sterilized on September 13, 1996, totaled 11,734,164 tons. *See* Decl. of Weir, Aug. 27, 2002, ¶ 4.

Lease 14A unmineable. *See* Pl.'s Br. filed Sept. 5, 2002, at 49. Although this percentage exceeds the amount of coal allegedly lost on Lease 5A, the court cannot view Lease 14A in a vacuum; instead, it must determine the effect of the decision on the parcel as a whole.[22]

The leases constituting the parcel as a whole granted a variety of mining rights in the petition area, in other areas of the Creek watershed, and outside the Creek watershed. While the section 1272 petition prevented plaintiff from performing surface mining in a certain part of the Creek watershed, plaintiff was not prohibited from exploiting its leases and its fee property in areas outside the petition area. Imposition of the section 1272 petition did not render the subject property economically idle. The court finds that plaintiff has not established a categorical taking.

3) *Partial regulatory taking*

Because plaintiff has not suffered a categorical taking, the court next turns to plaintiff's claim that the section 1272 petition effected a partial regulatory taking of its property. In *Tahoe-Sierra* the Court reaffirmed that the three factors identified in *Penn Central* and discussed above remain the touchstone in a partial regulatory takings analysis. *See* 122 S. Ct. at 1481, n.23. Although the court considers each of these factors in a partial regulatory takings analysis, the court will, in accordance with *Rith III* and *Rith IV*, first discuss plaintiff's investment-backed expectations.

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[22] Even if the court were to determine that the entire parcel suffered a 92% loss in coal reserves, and a corresponding 92% loss in value, this number would not qualify as a "total wipe-out" that signifies a categorical taking. *Palm Beach Isles*, 208 F.3d at 1380. The Supreme Court has acknowledged that "the categorical rule would not apply if the diminution in value were 95% instead of 100%." *Tahoe-Sierra*, 122 S. Ct. at 1483; *see also Palazzolo*, 533 U.S. at 631 (finding that 94% reduction in property value did not constitute categorical taking).

i. *Investment-backed expectations*

In her concurring opinion in *Palazzolo*, Justice O'Connor elaborated on the investment-backed expectations prong of the partial regulatory takings analysis. *See* 533 U.S. at 633-34. She concluded that a court must consider "the temporal relationship" between the regulation's enactment and title acquisition, since "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness" of plaintiff's investment-backed expectations. *Id.* at 634. Moreover, "the nature and extent of permitted development under the regulatory regime *vis-à-vis* the development sought by the claimant may also shape legitimate expectations . . . ." *Id.* at 634. While investment-backed expectations "are not talismanic under *Penn Central*," they inform the analysis of "whether the application of a particular regulation to particular property 'goes too far.' " *Id.* at 634 (quoting *Mahon*, 260 U.S. at 415).

Defendant finds plaintiff deficient with respect to the investment-backed expectations prong of the *Penn Central* analysis. Relying on *Rith III*, defendant posits that because plaintiff was well aware of SMCRA when it began obtaining leases in the Creek watershed, and because plaintiff knew of the section 1272 petition in negotiating all leases beginning with Lease 14A, plaintiff held no legitimate expectation that it could mine in the area unfettered by regulation. Plaintiff counters that existing OSM permits had been obtained on what became the 5A lease when it was purchased and that it "makes its living by complying with the provisions of SMCRA and has done so successfully for over twenty (20) years." Pl.'s Br. filed Sept. 5, 2002, at 44. Plaintiff reminds defendant that a section 1272 petition is an "extraordinary process" which was "certainly not predictable . . . [because] no such petition had previously been filed concerning mining operations in the [Creek] watershed during the 1970's and 1980's." *Id.* at 44-45. Finally, it dismisses *Rith* as inapposite to the case at hand, making the bold claim that plaintiff in *Rith* had been afforded an opportunity to pursue administrative and judicial remedies for its permit denial. Plaintiff argues that the

judicial review afforded the granting of section 1272 permits does not equate to the scrutiny given permit denials.

The Federal Circuit made clear in *Rith III* that "the consequence of concluding that there was no categorical taking in this case is that in order to establish that OSM's regulatory restraints constituted a compensable taking, [plaintiff] must show that it had a reasonable investment-backed expectation that it would not be subject to such restraints when it acquired the coal leases." *Rith III* at 1364. In that case plaintiff had no such expectation. Because SMCRA was enacted eight years before plaintiff acquired the coal leases at issue, and because the Act contained provisions that directly addressed acid mine drainage, plaintiff could not reasonably think that it "would be free from regulatory oversight with regard to the potential for acid mine drainage." *Id.* The court also noted a series of holdings that stand for the proposition that a property owner that takes property subject to an existing regulation reasonably cannot expect that it will be allowed untrammeled discretion in developing that property. *See Good* v. *United States*, 189 F.3d 1355, 1362 (Fed. Cir. 1999) (concluding that property owner's "constructive and actual knowledge that either state or federal regulations could ultimately prevent him from building on the property" precluded any reasonable investment-backed expectations); *M&J Coal Co.* v. *United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995) (noting that property owner cannot mine in manner to endanger public safety and health and that any state authorization received to mine "was subordinate to the national standards that were established by SMCRA and enforced by OSM").

This court must reject plaintiff's contention that *Rith* is inapposite to the case at hand. Plaintiff cannot argue that the judicial review afforded section 1272 petitions is somehow inferior to that offered to plaintiff in *Rith*, especially in light of plaintiff's refusal to pursue its remedy in district court. The facts of *Rith* are quite similar [to] those presented by plaintiff. Plaintiff commenced its effort to obtain coal mining rights in the Creek watershed with the acquisition of Lease 5A in 1989.

Thus, this lease was acquired more than ten years after the enactment of SMCRA. The two amendments to Lease 14A expressly stated that a section 1272 petition was pending. Plaintiff's argument that section 1272 petitions are "extraordinary" remedies is unavailing, given that plaintiff has not claimed that it was unaware of the possibility of a section 1272 petition; moreover, such an argument would be disingenuous in light of plaintiff's self-proclaimed status as a 20-year veteran of negotiating the SMCRA permitting process. Finally, although plaintiff is correct that one Tennessee-based, OSM-issued permit was extant on the land acquired from White Oak, the existence of this permit certainly does not substantiate plaintiff's belief that it would be allowed to mine its leased holdings in any manner it desired.

Plaintiff has thus not removed its situation from *Rith*'s ambit. Moreover, it cannot deny that the temporal relationship between the enactment of SMCRA and the time it purchased the parcel at issue gave it notice that it was subject to regulation. "The investment-based expectation criterion 'limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation. One who buys with knowledge of a straint assumes the risk of economic loss.' " *Forest Properties*, 177 F.3d at 1367 (quoting *Creppel* v. *United States*, 41 F.3d 627, 632 (Fed. Cir. 1994)). Plaintiff, with its acknowledged long history in negotiating SMCRA permits, cannot claim now that it had a reasonable expectation that its land would remain unfettered by regulatory imposition.

The court finds that plaintiff lacked reasonable investment-backed expectations regarding the development of the relevant parcel.

ii. *Character of the government action*

Although the *Rith III* court rested its conclusion that no compensable taking had occurred solely on the investment-backed expectations prong of *Penn Central*, it briefly addressed the nature of the government action in *Rith IV*, so this court will do the same. The Federal Circuit has

recognized that the *Lucas* decision fundamentally changed the court's analysis of the character of the government action. While courts previously had been called upon "to make *ad hoc* balancing decisions, balancing private property rights against state regulatory policy, . . ." *Lucas* shifted the focus to a framework where "state property law, incorporating common law nuisance doctrine, controls." *Loveladies*, 28 F.3d at 1179. Thus, if the Government shows that the activity it was regulating constituted a nuisance in the state's common law, it can avoid paying compensation because the right to engage in the activity was excluded from the owner's title. *See Lucas*, 505 U.S. at 1029.

The Federal Circuit addressed the nuisance issue in *M&J Coal* and *Rith IV*. Both of these cases involved the SMCRA permit process, as delegated to OSM. In *M&J Coal*, OSM issued a cessation order after plaintiff engaged in mining activities that put the public at risk of ground subsidence, collapsing structures, and cracks in utility lines. The order stated that plaintiff created "an imminent danger to the health and safety of the public." 47 F.3d at 1151. The Federal Circuit, in reviewing plaintiff's takings claim, stated that plaintiff "could not have acquired under its deed of title the right to cause damage or a substantial risk of damage to the public health and safety." *Id.* at 1154. Thus, it was "incontestable that OSM's actions were legitimate exercises to prevent harm to the public health and safety." *Id.*

The *Rith IV* court echoed language from *M&J Coal* when it suggested that the "exercise of the police power directed at protecting the safety, health, and welfare of the communities . . ." surrounding the regulated area "is the type of government action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations." *Rith IV* at 1352. Because the revocation of plaintiff's permit was directed at preventing environmental harm, the state was acting within its police power and not engaging in an activity for which it was required to compensate plaintiff.

Defendant therefore can avoid compensation under this prong of the *Penn Central* analysis by showing that it was abating a common law nuisance by exercising its police power in granting the section 1272 petition. Defendant asserts that plaintiff's mining activities in the petition area would constitute a nuisance *per se* under the TWQCA and recites a litany of Tennessee cases which define water pollution as an enjoinable nuisance. Plaintiff rejoins that the findings made by the Director of OSM on the section 1272 petition are not conclusive in this action, as they are not the result of a judicial proceeding. Moreover, the support offered for the Director's decision in the PED/EIS, according to plaintiff, would not prove a violation of the TWQCA or warrant the issuance of an injunction.

The Director of OSM based his decision on several factors, including prevention of harm to 1) the blackside dace, 2) the development of the Cumberland Gap Historical Park, and 3) the quality of the city of Middleboro's water supply. When analyzing the section 1272 petitioners' allegations, OSM specifically found that surface coal mining operations would "result in the diminution of water quality and increase water treatment costs . . . ." PED/EIS, Aug. 1996, p. IV-23.[23] Thus, if water pollution is an enjoinable nuisance under Tennessee Jaw, then, under the rationale of *M&J Coal* and *Rith IV*, OSM was engaging in a proper, and non-compensable, exercise of its police power in preventing a nuisance.

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[23] Although plaintiff repeatedly charges that the OSM findings are somehow inadequate, this court is not the proper forum for plaintiff to make such an argument. As explained *infra* section II, plaintiff's choice to withdraw its district court challenge to the section 1272 petition prevents it from attacking the validity of the Director's findings. While plaintiff is free to claim that Tennessee law does not recognize water pollution as a common law nuisance, it may not rebut defendant's nuisance argument on the alleged insufficiency of the evidence supporting the OSM Director's decision.

Defendant substantiates that water pollution has been an actionable nuisance in Tennessee for more than 150 years. *See, e.g., Neal* v. *Henry*, 1838 Tenn. LEXIS 5, at *8-9 (Tenn. Apr. 1838) (finding nuisance when defendant dammed creek and caused water to stagnate); *Love* v. *Nashville Agric. & Normal Inst.*, 243 S.W. 304, 308 (Tenn. 1921) ("[I]t is well-settled law that if a person renders the water of another impure . . . he thereby creates a nuisance, under our statute as well as the common law, which can be abated as such."); *Wayne County* v. *Tenn. Solid Waste Disposal Control Bd.*, 756 S.W. 2d 274,284 (Tenn. Ct. App. 1988) ("The pollution of a person's water supply has been recognized as conduct amounting to a private nuisance.").

Moreover, the TWQCA merely codifies this principle. Section 69-3-102(a) of the TWQCA recognizes that the waters of the state are held in trust for its citizens, subject to the citizens' right to unpolluted waters. *See* Tenn. Code Ann. § 69-3-102 (2002); *see also Rith I* at 114. The TWQCA's purpose is to abate past pollution and prevent future harm to the state's waters, and it creates an extensive permitting process which disallows the issuance of a permit which would allow pollution. *See* Tenn. Code Ann. §§ 69-3-105(b), 108(e) (2002). Included in the statutory definition of pollution are actions that will "[r]esult or will likely result in harm, potential harm or detriment of the public health, safety or welfare." Tenn. Code Ann. § 69-3-103(22)(A) (2002).

It is clear that water pollution is an abatable nuisance under both Tennessee common law and the TWQCA. By granting the section 1272 petition, OSM exercised its police power to protect its citizens from a nuisance, thereby weighing this factor of the *Penn Central* analysis in the Government's favor.

iii. *Economic impact*

The " 'economic impact of the regulation upon the claimant' is 'measured by the change, if any, in the fair market value caused by the regulatory imposition.' " *Forest Properties*, 177 F.3d at 1367 (quoting *Florida Rock*, 18 F.3d at 1567). Given the court's finding that plaintiff lacked reasonable

investment-backed expectations and that the section 1272 petition restricted a common law nuisance, even a showing of severe diminution in economic value will not result in a compensable partial regulatory taking. *See Rith IV* at 1352 (finding that "substantial diminution" in value of plaintiff's coal leases did not evince compensable taking, because plaintiff lacked reasonable investment-backed expectations and government was regulating through its police power); *see also Penn Coal*, 260 U.S. at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."). As the Federal Circuit recently stated, the Government is entitled to summary judgment on a partial regulatory takings claim where plaintiffs lacked reasonable, investment-backed expectations, even when the challenged government action "substantially reduced the value of plaintiffs' property." *Good*, 189 F.3d at 1363 (quoting *Avenal*, 100 F.3d at 937).

Both parties have presented valuation data, yet neither valuated the appropriate parcel as a whole. *See generally* Weir Study; Micon International Limited, "The Fair Market Value at September 13, 1996, of the Coal Interests of Appolo Fuels, Inc., in and around the Fern Lake Petition Area, Claiborne County, Tennessee," Nov. 19, 2001. However, as noted, the *Rith IV* court concluded that a 91% reduction in mineable coal, when viewed against plaintiff's ability to profit from its coal holdings, did not constitute a compensable taking. *See Rith IV* at 1342. Plaintiff has made no showing that it cannot mine on the portions of Leases 5A, 14A, 15A, 16A and 17A that lie outside the petition area. Although plaintiff contends that the section 1272 petition rendered unmineable 78% of the tonnage on Lease 5A, and 92% of the tonnage on Lease 14A, it has not shown that the petition "makes it impossible for [plaintiff] to profitably engage in [its] business." *Keystone*, 480 U.S. at 485. Even if plaintiff's partial regulatory takings claim was not diminished by the court's findings on plaintiff's investment-backed expectations and the character of the regulatory action, plaintiff has put

forth an insufficient showing to generate a genuine issue of fact as to the economic impact prong of the *Penn Central* analysis.

Plaintiff lacked a reasonable investment-backed expectation that it could mine unobstructed by the complex regulatory framework that characterizes the mining industry. The OSM decision prevented plaintiff from engaging in an enjoinable nuisance, *i.e.*, polluting the city of Middlesboro's water supply. While the grant of the petition reduced the coal reserves available to plaintiff, plaintiff has not shown that it cannot exploit the portions of its leases that lie outside the petition area.

Accordingly, the court grants defendant's summary judgment motion as to plaintiff's partial regulatory takings claim.

4) *Temporary taking*

Plaintiff charges that OSM's delay in granting the section 1272 petition should constitute a temporary taking. It contends that OSM exceeded the 12-month statutory timetable for rendering a decision on a section 1272 petition. *See* 30 U.S.C. § 1272(c) (requiring hearing within ten months of section 1272 petition and decision within 60 days of hearing). Plaintiff's temporary taking allegedly spans from February 15, 1995 (one year and one day after filing of section 1272 petition), to September 13, 1996 (the date on which the petition was granted).

In *Tahoe-Sierra* the Supreme Court addressed a landowner's contention that two moratoria constituted a compensable taking and reiterated that the *Penn Central* analysis applies to temporary regulatory activity. *See* 122 S. Ct. 1465, 1484-85. In the case at bar, defendant posits that the Federal Circuit, in addition to the *Penn Central* criteria, requires plaintiff to show "extraordinary delay on the part of the permitting agency" to establish that a temporary taking occurred. Def.'s Br. filed May 20, 2002, at 52. The Federal Circuit's recent decision in *Boise Cascade Corp.* v. *United States* validates defendant's position that "absent denial of the permit, only an

extraordinary delay in the permitting process can give rise to a compensable taking." 296 F.3d 1339, 1350 (Fed. Cir. 2002).

The Federal Circuit clarified the meaning of "extraordinary delay" in *Wyatt* v. *United States*, a case involving a permit denial by the Tennessee office of OSM. *See* 271 F.3d 1090 (Fed. Cir. 2001). Plaintiff in *Wyatt* applied for a mining permit from OSM in October 1984; two months later, OSM informed plaintiff that its application was missing at least 28 items of required information. Plaintiff corrected these deficiencies by March 1985. OSM then deemed the permit application administratively complete and began its technical review process. In May 1985 OSM again requested additional information, and plaintiff responded one month later. Because plaintiff's response was inadequate, OSM requested at least 29 specific pieces of additional information in December 1985. Instead of responding to the request, plaintiff sought assistance from OSM's Small Operator Assistance Program ("SOAP"). OSM denied the permit application in July 1986 before it acted on the SOAP application. Plaintiff appealed to an administrative law judge, who requested that the parties attempt to facilitate the permit process by supplying OSM with the requested information. Plaintiff and OSM continued to squabble until April 1994, when OSM finally denied plaintiff's permit request. After the denial plaintiff sued for a temporary taking.

Noting that the mere existence of a permitting program and the initiation of permit proceedings do not constitute a taking,[24] the Federal Circuit allowed that a temporary taking could occur if an extraordinary delay is present in the government decision-making process. *See Tabb Lakes*, 10 F.3d at 803. However, the *Wyatt* court emphasized that only

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[24] The Supreme Court has held that the requirement that "a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted." *United States* v. *Riverside Bayview Homes. Inc.*, 474 U.S. 121, 126-27 (1985).

extreme circumstances warrant a finding of extraordinary delay. The court pointed out that the Supreme Court had concluded in *Tahoe-Sierra* that a 32-month series of moratoria did not qualify as a compensable taking. The court also cautioned that "[b]ecause delay is inherent in complex regulatory permitting schemes, [a court] must examine the nature of the permitting process as well as the reasons for any delay." 271 F.3d at 1098. While the length of delay should also be considered, it is not the primary factor in a temporary takings analysis; also, "it is the rare circumstance that [a court] will find a taking based on extraordinary delay without a showing of bad faith." *Id.* (citing *Tabb Lakes*, 10 F.3d at 803). Moreover, the court indicated that, in terms of deciding what "additional information is required to satisfy statutorily imposed obligations," deference should be granted to agencies that implement complex regulatory schemes. *Id.* It was deemed essential to "recognize that delay in the permitting process may be attributable to the applicant as well as the government." *Id.*

Despite the nearly ten-year delay in processing plaintiff's application, the Federal Circuit concluded that no extraordinary delay had occurred in *Wyatt*. Based on OSM's expertise in the area, the court acknowledged the significant deference owed to OSM in its processing of plaintiff's permit application and attributed some of the delay to plaintiff's inadequate responses to OSM's request for information.

Applying the above analytical framework to this case, the court finds that OSM's processing of the section 1272 petition did not effect a temporary taking. Although OSM exceeded the time line for decision making codified in section 1272(c), defendant justifies the additional time taken by OSM based on the agency's determination that its decision on the section 1272 petition must comply with both section 522(d) of SMCRA (statement of impact on environment, economy, and coal supply), *see* 30 U.S.C. § 1272(d), and section 102(2)(C)

of NEPA (statement of impact on environment), *see* 42 U.S.C. § 4332(2)(C).[25]

In light of the Federal Circuit's admonition that judicial deference is required when reviewing an agency determination with respect to the satisfaction of statutory obligations, this court cannot find that OSM's decision to follow the dictates of both statutes, and the resultant delay in processing the section 1272 petition, constituted an extraordinary delay.[26] The total delay in this case was just over one year. To characterize such a delay as extraordinary would not be consistent with the import of Supreme Court and Federal Circuit precedent, and plaintiff presented no case law at all in arguing the issue. When the Federal Circuit in *Wyatt* determined that an almost ten-year delay in processing plaintiff's application was not an extraordinary delay, the regulatory agency in that case was the Tennessee branch of

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[25] 30 U.S.C. § 1272(d) reads: "Statement. Prior to designating any land areas as unsuitable for surface coal mining operations, the regulatory authority shall prepare a detailed statement on (i) the potential coal resources of the area; (ii) the demand for coal resources; and (iii) the impact of such designation on the environment, the economy, and the supply of coal." 42 U.S.C. § 4332(2)(C) requires that all federal government agencies

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on: (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

[26] The court lacks jurisdiction to review the merits of the agency decision. *See infra* section II.

OSM. Given the similarity of that case to this one, the legal result shall be the same.

Defendant's motion for summary judgment as to plaintiff's temporary takings claim is granted.

II. Defendant's Motion *in Limine*

After defendant filed, on June 18, 2002, its Motion *in Limine* To Bar Plaintiff from Challenging the Validity of the Government Action that Allegedly Effected a Taking in this Case, the court ordered that briefing proceed in tandem with defendant's motion for summary judgment because the same issues were involved. *See* Order entered on July 10, 2002. Although the court has granted defendant's summary judgment motion in its entirety, certain of its rulings are predicated on arguments made in defendant's motion *in limine*. Thus, the court addresses the motion.

Defendant argues that plaintiff, having voluntarily dismissed its district court challenge to the section 1272 petition, "*must* assume that [the grant of the petition] was valid in all respects in order to proceed with its takings case in this Court." Def's Br. filed June 18, 2002, at 14. To this end, defendant asserts that "any evidence attacking the designation [of the petition area as unsuitable for surface mining], . . . and the agency documents supporting [it], should be excluded as unnecessary, irrelevant, and inadmissable." Def.'s Br. filed June 18, 2002, at 14. Defendant proposes that "any evidence purporting to demonstrate that Plaintiff could have received permits absent the [section 1272 petition] is irrelevant and should likewise be excluded." *Id.* at 14-15.

Plaintiff responds that defendant is putting forward its argument in order to absolve itself from having to prove a nuisance defense to plaintiff's takings claim. *See* Pl.'s Br. filed Sept. 5, 2002, at 37. If it is prohibited from presenting evidence that implicates the section 1272 petition, plaintiff argues that the petition will be "conclusive on the nuisance issue." *Id.* at 38. Conceding that OSM's "decision is valid, in the sense that the Director was legally authorized to make the decision," plaintiff nonetheless reads Federal Circuit

precedent as not forcing plaintiff to "concede that all of the Director's conclusions were accurate." *Id.* at 38. As plaintiff notes, " 'validity' is not the same thing as factual or legal correctness." *Id.* at 39.

Both defendant's and plaintiff's arguments hinge on the "validity" of the underlying agency action and the judicial deference owed to the result of that action. As plaintiff observes, "validity" in the takings context does not refer to the outcome of the governmental action that allegedly effected a taking; rather, it denotes whether the government official had authority to perform the action at issue. The Federal Circuit recently addressed the meaning of "valid" governmental action by acknowledging that its previous takings jurisprudence occasionally had referred to "invalid" or "illegal" government conduct as "unauthorized;" however, the court clarified that it "understand[s] those references [to unauthorized conduct] to require a showing that the conduct was *ultra vires*, *i.e.*, it was either explicitly prohibited or was outside the normal scope of the government officials' duties." *Del-Rio Drilling Programs, Inc.* v. *United States*, 146 F.3d 1358, 1363 (Fed. Cir. 2002); *accord Custer County Action Assoc.* v. *United States*, 256 F.3d 1024, 1042 (10th Cir. 2001).

The question of authorization has important jurisdictional implications for a takings claimant, because a "compensable taking arises only if the government action in question is authorized." *Del-Rio*, 146 F.3d at 1362. An unauthorized government action cannot predicate liability for a compensable taking, given that it does not "vest some kind of title in the government[,] and entitlement to just compensation in the owner or former owner." *Armijo* v. *United States*, 229 Ct. Cl. 34, 40, 663 F.2d 90, 95 (1981), *cited with approval in Del-Rio*, 146 F.3d at 1362. Therefore, a "claimant must concede the validity [or authorization] of the government action which is the basis of the taking claim to bring suit under the Tucker Act . . . ." *Tabb Lakes*, 10 F.3d at 802.

Advancing the issue of authorization one step further, defendant argues that, in a takings action brought in the Court of Federal Claims, the alleged taker is entitled to proceed on

the presumption that the underlying agency determination is both authorized and accurate. *See* Def.'s Br. filed June 18, 2002, at 13 (claiming that "the law of the Federal Circuit" gives Government right to have takings claim "assessed on the basis that its regulatory action was valid and correct in all respects"). Defendant grounds this argument on *Florida Rock* and asserts that this presumption of accuracy remains the law in this circuit.

Authorization to act does not equate to accuracy of outcome, as "a government official may act within his authority even if his conduct is later determined to have been contrary to law." *Del-Rio*, 146 F.3d at 1362; *see also Custer County*, 256 F.3d at 1042 ("An agency may act within its authority even if its action is later determined to be legally erroneous."); *Paalan* v. *United States*, 51 Fed. Cl. 738, 748 (2002) ("The dispositive issue in a takings claim . . . is not whether the Government's conduct was legal—rather, whether it was authorized."). Therefore, defendant is not entitled to a presumption that the Government's conduct was accurate (and, consequently, unassailable) merely because it was authorized. Defendant nevertheless is correct that, after a takings claimant has foregone, or not prevailed in, a district court challenge to the lawfulness of the agency action, the claimant must litigate its takings claim on the presumption that the governmental conduct was both authorized and accurate.

Florida Rock is instructive on this point. Plaintiff possessed the correct local zoning classification to allow it to mine limestone in an area of Dade County, Florida. However, 1972 amendments to the CWA drew the property under CWA jurisdiction, and the Corps prevented plaintiff from mining until it received a proper permit. Although plaintiff applied for a permit, it was denied after the Corps determined that granting the permit would not be in the public interest.

Plaintiff then brought suit for a partial regulatory taking in the Claims Court, and the trial judge issued a bench ruling which assumed that the Corps engineers were authorized to act and that the permit denial advanced a legitimate public purpose. A written opinion issued one year later by the trial

court, however, challenged the lawfulness of the permit denial, finding that the engineers' fears that the mining would pollute the water supply were unfounded.

The Federal Circuit, in vacating and remanding the trial court's takings decision, noted that the "proper way to challenge the decision to grant or withhold the permit would be under the Administrative Procedure Act (APA)" in district court. 791 F.2d at 898. Similarly, the court determined that foregoing an APA challenge had the same effect as if the district court had upheld the agency determination in all respects. In sum, the court concluded that "the alleged taker had a right, in the Claims Court, to have the claim assessed on the basis that its regulatory action was valid and correct in all respects." *Id.* at 905.

Rith III is the Federal Circuit's most recent pronouncement on the appropriate deference to be accorded the underlying agency determination. After its permit was repealed by OSM, plaintiff filed an administrative appeal to the rescission. Both the Interior Department's Office of Hearings and Appeals, and the Interior Board of Land Appeals (the "IBLA") upheld the OSM decision. Plaintiff subsequently filed suit in district court for, *inter alia*, a review of the IBLA decision and a takings claim. After plaintiff voluntarily moved to dismiss its claim seeking review of the IBLA decision, the district court granted that motion with prejudice. The district court proceedings progressed to the point at which only plaintiff's takings claim remained, so the district court transferred the case to the Court of Federal Claims.

When the trial court granted summary judgment to the Government on plaintiff's takings claim, plaintiff argued on appeal that *Del-Rio* entitled it to relitigate, in its takings claim, its previous unsuccessful challenges to the permit denial. The Federal Circuit, however, clarified that *Del-Rio* stands for the proposition that a takings claimant may bring a takings case in the Court of Federal Claims and/or a challenge to the lawfulness of the agency action in a district court, as they constitute "two separate wrongs [that] give rise to two separate causes of action." *Rith III* at 1365 (internal quotation

marks omitted). A district court challenge to the agency action is not a predicate for a takings claim in the Court of Federal Claims, as a claimant may sue in that court "even if the government's action was subject to legal challenge on some other ground." *Id.* The court explained:

> To the extent that [plaintiff] suggests that *Del-Rio* entitles it to argue in the Court of Federal Claims that OSM's permit denial was unlawful under SMCRA, or to relitigate in the takings action its unsuccessful statutory challenge to the permit denial, it reads too much into *Del-Rio*. The question whether OSM violated SMCRA by its ruling on a permit application in a particular case was assigned by Congress to the administrative process within the Department of the Interior, subject to judicial review in a district court. *Del-Rio* does not give the Court of Federal Claims authority to adjudicate that issue *de novo*.
>
> . . . .
>
> [H]aving foregone its challenge to OSM's administrative actions, [plaintiff] is not free to renew its challenge to those actions under the cover of a takings claim . . . . [Plaintiff] is thus required to litigate its takings claim on the assumption that the administrative action was both authorized and lawful. On the facts of this case, the consequence of assuming the lawfulness of OSM's actions, *i.e.*, that OSM was correct in concluding that [plaintiff's] mining activities constituted an unacceptable threat of . . . pollution of groundwater in the area surrounding the mine operations, is to limit the issue before us to . . . [the alleged] taking."

Id. at 1365-66.

The import of *Florida Rock* and *Rith III* is unavoidable. Plaintiff is precluded from attacking the lands unsuitable designation in the Court of Federal Claims. *See M & J Coal*, 47 F.3d at 1154 ("Neither the Court of Federal Claims nor [the Federal Circuit] may entertain a collateral challenge to the

validity of OSM's actions."). Because plaintiff voluntarily dismissed its district court challenge to OSM's actions, defendant is entitled to a presumption that OSM's decision was both authorized and legally correct. Plaintiff cannot argue successfully that *Del-Rio* allows it to challenge the factual basis of OSM's decision, as *Rith III* held that such a challenge may be brought only in district court. *Rith III* at 1365-66.

With respect to authorization, plaintiff has acknowledged that OSM was authorized to consider the petition and to render its decision. *See* Pl.'s Br. filed Sept. 5, 2002, at 38. With respect to the accuracy issue, plaintiff presents contradictory assertions. On the one hand, it claims that it "does not ask this Court to re-examine the Director's . . . decision, or whether he correctly evaluated the petition issues." *Id.* at 40. On the other hand, plaintiff contends that its "proof will show that it could have met SMCRA standards and would have received a permit, absent the designation . . . [and that] mining could be accomplished without material harm to the water in Fern Lake." *Id.* Plaintiff apparently is contending that it is precluded only from attacking the grant of the section 1272 petition, so that it can present evidence showing that, absent the petition, OSM would have granted plaintiff a mining permit. To allow plaintiff to present such evidence would ignore the presumption accorded alleged takers in this circuit that the agency determination was both authorized and correct in all respects. Plaintiff may not pick and choose which aspects of OSM's decision it may attack in prosecuting a takings claim.[27]

CONCLUSION

Plaintiff has not presented sufficient evidence to preclude summary judgment on its categorical regulatory takings claim, its partial regulatory takings claim, and its temporary takings claim. Defendant established that plaintiff cannot show that the section 1272 petition destroyed all economically viable use of the parcel as a whole. Defendant established that

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[27] *See supra* note 5.

plaintiff cannot satisfy the *Penn Central* factors that govern the analysis of a partial regulatory takings claim. Defendant established that plaintiff could not demonstrate that OSM's delay in granting the petition amounted to extraordinary delay. Because plaintiff may not challenge the OSM Director's decision to grant the section 1272 petition in this court, only the three takings claims ruled on are within the court's jurisdiction. The court thus grants defendant's motion for summary judgment in full. Accordingly,

IT IS ORDERED, as follows:

1. Defendant's Motion for Summary Judgment is granted, and the Clerk of the Court shall enter judgment for defendant.

2. Defendant's Motion *in Limine* is granted, insofar as plaintiff may not attack the accuracy of the section 1272 petition in the Court of Federal Claims.

/s/
Christine Odell Cook Miller
Judge

APPENDIX C

In the United States Court of Federal Claims

No. 00-1 L

APPOLO FUELS, INC.,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Published Opinion, filed December 18, 2002, granting defendant's Motion for Summary Judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is for the defendant and the complaint is dismissed.

Margaret M. Earnest
Clerk of Court

December 18, 2002

By: /s/
Deputy Clerk

NOTE: As to appeal, 60 days from this date, *see* RCFC 58.1, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-5088

APPOLO FUELS, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 21, 2004.

FOR THE COURT

/s/

Jan Horbaly
Clerk

Dated: October 7, 2004

APPENDIX E

The Surface Mining Control and Reclamation Act of 1977, Section 1272(c) of Title 30 of the United States Code, provides, in relevant part, as follows:

[fix indents below]

(3) Upon petition pursuant to subsection (c) of this section, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will–

(A) be incompatible with existing State or local land use plans or programs; or

(B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems; or

(C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or

(D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

(4) To comply with this section, a State must demonstrate it has developed or is developing a process which includes—

(A) a State agency responsible for surface coal mining lands review;

(B) a data base and an inventory system which will permit proper evaluation of the capacity of different land areas of the State to support and permit reclamation of surface coal mining operations;

(C) a method or methods for implementing land use planning decisions concerning surface coal mining operations; and

(D) proper notice, opportunities for public participation, including a public hearing prior to making any designation or redesignation, pursuant to this section.

(5) Determinations of the unsuitability of land for surface coal mining, as provided for in this section, shall be integrated as closely as possible with present and future land use planning and regulation processes at the Federal, State, and local levels.

(6) The requirements of this section shall not apply to lands on which surface coal mining operations are being conducted on the date of enactment of this Act [enacted Aug. 3, 1977] or under a permit issued pursuant to this Act [30 USCS §§ 1201 et seq.], or where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977.

Subsection (c) and (d) provide:

(c) Petition; notice intervention; decision. Any person having an interest which is or may be adversely affected shall have the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations, or to have such a designation terminated. Such a petition shall contain allegations of facts with supporting evidence which would tend to establish the allegations. Within ten months after receipt of the petition the regulatory authority shall hold a public hearing in the locality of the affected area, after appropriate notice and publication of the date, time, and location of such hearing. After a person having an interest which is or may be adversely affected has filed a petition and before the hearing, as required by this subsection, any person may intervene by filing allegations of facts with supporting evidence which would tend to establish the allegations. Within sixty days after such hearing, the regulatory authority shall issue and furnish to the petitioner and any other party to the

hearing, a written decision regarding the petition, and the reasons therefore [therefor]. In the event that all the petitioners stipulate agreement prior to the requested hearing, and withdraw their request, such hearing need not be held.

(d) Statement. Prior to designating any land areas as unsuitable for surface coal mining operations, the regulatory authority shall prepare a detailed statement on (i) the potential coal resources of the area, (ii) the demand for coal resources, and (iii) the impact of such designation on the environment, the economy, and the supply of coal.